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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 18, 2020

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OF
NORTH CAROLINA

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FILED 19 JUNE 2018

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ADMINISTRATIVE LAW

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ADMINISTRATIVE LAW—Continued

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Factual stipulations—invited error—The doctrine of invited error did not apply in a child neglect case where the mother admitted at a pre-adjudication hearing that her child was a neglected juvenile. The mother was merely admitting certain facts concerning her daughter's problems in school and missed medical visits, and there was no indication that the mother asked the trial court to adjudicate her child as a neglected juvenile or to remove her from her care. **In re R.L.G., 70.**

Neglect—adjudication—sufficiency of findings—A finding in a pre-hearing order could not serve as a substantive basis for an adjudication of neglect where the trial court did not indicate an intent for any part of the pre-hearing order to do so and the finding was not one made independently by the trial court but was merely a recitation of a finding made by the Department of Social Services during its investigation. **In re R.L.G., 70.**

Neglect—adjudication—sufficiency of findings—The trial court's findings of fact were not sufficient to support its adjudication of neglect where the only findings in support of the adjudication were the mother's admission that the child was a "neglected juvenile," the mother's failure to ensure the child attended school regularly, the child's failing grades in three classes, and the mother's failure to take the child to "well care visits" to address her "medical needs." The mother's admission

was a question of law and therefore an invalid stipulation, and the bare facts of the child's missed classes and medical visits—without more information, such as the reason for the problems in school or what medical conditions necessitated the medical visits—were insufficient to support the adjudication. **In re R.L.G., 70.**

Neglect—termination of juvenile proceeding—civil custody action—required findings of fact—The trial court erred by failing to make required findings pursuant to N.C.G.S. § 7B-911(c) when it terminated a juvenile proceeding and initiated a civil custody action under Chapter 50. **In re J.D.M.-J., 56.**

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Placement—out-of-state relatives—Interstate Compact on the Placement of Children requirements—interests of children—The trial court erred by awarding custody of minor children to their out-of-state aunt and uncle without ensuring that the provisions of the Interstate Compact on the Placement of Children (ICPC) had been satisfied through notification from the other state that the placement did not appear to be contrary to the interests of the children. Where prior decisions were in conflict on this issue, the Court of Appeals followed the older line of cases. **In re J.D.M.-J., 56.**

Visitation—children adjudicated neglected—statutory findings—The trial court erred by failing to make necessary findings concerning a mother's visitation rights in a permanency planning review order pursuant to N.C.G.S. § 7B-905.1(c). While the order did address visitation in the event the mother moved to Arizona, where the children were placed with relatives, the order failed to provide any direction as to the frequency or length of visits in the event the mother did not move to Arizona, and it failed to specify whether visits should be supervised or unsupervised. **In re J.D.M.-J., 56.**

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Effective assistance of counsel—failure to raise self-defense—obvious claim—Defendant received effective assistance of counsel in an assault prosecution even though he contended that his trial counsel failed to present self-defense. Defense counsel stipulated to the State's introduction of defendant's interview with the police in which he asserted self-defense, defendant did not argue that there was additional evidence beyond that evidence, and the issue of self-defense was obvious. This was a bench trial, and there was no evidence that the trial judge did not consider self-defense. **State v. Jones, 104.**

Effective assistance of counsel—pre-trial plea bargaining—Defendant's argument that he received inadequate representation was dismissed where the record was not sufficient to determine whether trial counsel was ineffective. **State v. Cozart, 96.**

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Facial challenge—political advertisements—disclosure law—content-based restriction—A state statute requiring political ads to disclose the identity of the ad sponsor's CEO or treasurer did not contain a content-based restriction violative of the First Amendment, based on U.S. Supreme Court precedent in *Citizens United v. FEC*, 558 U.S. 310 (2010). **Comm. to Elect Dan Forest v. Emps. Political Action Comm., 1.**

Right to counsel—substitution of appointed counsel—The trial court did not abuse its discretion by denying defendant's motion to discharge appointed counsel where the trial court allowed defendant the opportunity to explain his desire to discharge his appointed counsel, inquired into defendant's competence before ruling, and treated the motion as one for a continuance and to substitute counsel. **State v. Cozart, 96.**

Standing—injury—actual damage—breach of private right—The committee to elect a political candidate had standing to seek statutory damages for an alleged violation of a "stand by your ad" law regarding political television advertisements even though the candidate won the election, since at least nominal damages may be shown where a private right has been breached, even if no actual damages were inflicted aside from the breach itself. Here, the legislature had the authority to create a private right of action for political candidates and their committees to enforce its policy decision that political television ad sponsors be properly disclosed. **Comm. to Elect Dan Forest v. Emps. Political Action Comm., 1.**

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Construction loan—duty of care—A residential construction loan agreement provision stating that an appraisal must account for applicable regulatory requirements did not create a duty of care for the lender to ensure the accuracy of the appraisal or its compliance with government standards where the appraisal was for the sole benefit of the lender, rendering the borrower's claims for breach of contract and breach of implied covenant of good faith and fair dealing subject to dismissal. **Cordaro v. Harrington Bank, FSB, 26.**

DAMAGES AND REMEDIES

Statutory damages—not dependent on actual damages—A committee to elect a political candidate did not have to put forth evidence of actual damages in order to recover statutory damages for violation of a "stand by your ad" law governing political television advertisements where the legislature had authority to provide for statutory damages. While it is possible for statutory damages to be unconstitutionally excessive by being wholly disproportionate to the statutory violation, in this case the amount of statutory damages, if any, had yet to be determined. **Comm. to Elect Dan Forest v. Emps. Political Action Comm., 1.**

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Negligent infliction of severe emotional distress—sufficiency of evidence —Plaintiff's evidence was insufficient to support a claim for negligent infliction of severe emotional distress where it did not show that a volunteer fire department acted in a negligent manner when responding to a structure fire at her house, nor that she suffered severe emotional distress where she only attended one

EMOTIONAL DISTRESS—Continued

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EVIDENCE

Indecent liberties—expert witness—opinion testimony—A certified Sexual Assault Nurse Examiner did not vouch for the the victim's credibility in an indecent liberties prosecution where she testified that a finding of erythema, or redness, was consistent with touching, but could also be consistent with "a multitude of things." **State v. Orellana, 110.**

Instantaneous conclusion of fact—detective's interview with minor—There was no error in an indecent liberties prosecution where a detective testified about his observations of the victim's demeanor when he was interviewing her. Rather than constituting an opinion about the victim's credibility, the detective's testimony contained the type of instantaneous conclusion admissible as a shorthand statement of fact. **State v. Orellana, 110.**

Mother of child sexual assault victim—vouching for child's credibility—no plain error—There was no plain error in a prosecution for indecent liberties where the victim's mother testified that she believed her daughter was truthful in her accusations. Assuming that the testimony was improper, defendant did not demonstrate that the jury would probably have reached a different result absent the error. **State v. Orellana, 110.**

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No contact order—firearms provision added sua sponte—no authority—The provisions of a no-contact order (not a domestic violence prevention order) regarding firearms were reversed. The district court does not have the authority under Chapter 50C of the North Carolina General Statutes sua sponte to order defendant to surrender his firearms, revoke his concealed carry permit, or order defendant not to purchase firearms during the period the order is in effect. **Russell v. Wofford, 88.**

JURISDICTION

Condition precedent—statutory requirement—agency complaint—timeliness of notice—The committee to elect a political candidate satisfied the statutory requirement of timely filing a notice of complaint with the State Board of Elections prior to bringing suit alleging a violation of a "stand by your ad" law governing political television advertisements. Evidence that the committee appropriately followed statutory procedure included a verified complaint stating when the committee sent its required notice to the state agency; the lack of a file stamp did not negate the jurisdiction of either the superior court or the Court of Appeals. **Comm. to Elect Dan Forest v. Emps. Political Action Comm., 1.**

Standing—citizen—county transfer of land—Plaintiff did not have standing for his claims arising from Hoke County's conveyance of land for an ethanol plant where he did not allege that he was a taxpayer and did not assert a traceable, concrete, and particularized injury resulting from the transfer of the land. **Walker v. Hoke Cty., 121.**

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Questions—answers not given in courtroom—While the trial court erred in an indecent liberties prosecution by not conducting the jury into the courtroom to answer questions, there was no showing that defendant was prejudiced or that there was a constitutional violation. The bailiff brought notes containing questions into the courtroom to the judge and delivered the judge's written responses to the jury; the judge did not interact with or provide instructions to less than a full jury panel. The trial court could not allow the jury to review police reports that were not in evidence and there was no showing of prejudice from a failure to delay deliberations while a trial transcript was produced. **State v. Orellana, 110.**

NEGLIGENCE

Construction loan—bank appraisal—justifiable reliance by borrower—A borrower failed to properly plead the element of justifiable reliance in his claims for negligence and negligent misrepresentation against a lender by not including allegations that he undertook his own independent inquiry about the validity of the lender's appraisal prior to taking out a residential construction loan or that he was prevented from doing so. **Cordaro v. Harrington Bank, FSB, 26.**

Volunteer fire department—structure fire—reasonableness of response—A resident's claim for negligence against a volunteer fire department for failing to timely respond to a structure fire at her house and to maintain the operability of a fire hydrant by her house was properly dismissed where the resident failed to produce sufficient evidence of either basis for her claim. **McClease v. Dover Volunteer Fire Dep't, 81.**

PUBLIC OFFICERS AND EMPLOYEES

Amotion—lack of standing—The trial court did not err by dismissing plaintiff's claim to remove elected county officials for lack of standing. Removal by "amotion" is a quasi-judicial procedure employed by the board or commission from which the member is being removed for cause. Plaintiff did not allege that he was a member of any of the boards from which he sought to remove members. **Walker v. Hoke Cty., 121.**

Discharge—just cause—resignation—An administrative law judge properly determined that a correction officer's discharge was not in accord with North Carolina law where the agency's argument consistently hinged on the notion that the employee voluntarily resigned and that proposition was rejected by the Court of Appeals. The agency did not argue that it had just cause to terminate the employee's employment. **Hunt v. N.C. Dep't of Pub. Safety, 40.**

SATELLITE-BASED MONITORING

No written notice of appeal at trial—writ of certiorari denied—Defendant's petition for certiorari from the imposition of lifetime satellite-based monitoring (SBM) was denied where defendant gave only an oral notice of appeal and no written notice appeal was served on the parties. Since SBM is a civil proceeding, the requirements of Appellate Rule 3 must be met to confer appellate jurisdiction, including a written notice of appeal. **State v. Cozart, 96.**

STALKING

No-contact order—findings—supporting evidence sufficient—A no-contact order was affirmed (except for provisions regarding firearms) where defendant argued that he did not commit the acts alleged but acknowledged that there was sufficient evidence to support the trial court's findings of fact and did not actually challenge the conclusions of law. **Russell v. Wofford, 88.**

UNFAIR TRADE PRACTICES

Misrepresentation—reliance—sufficiency of pleadings—A borrower asserting a claim for unfair and deceptive trade practices against a lender failed to sufficiently allege that he reasonably relied on the appraisal obtained by the lender before entering into an agreement for a residential construction loan. **Cordaro v. Harrington Bank, FSB, 26.**

SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

CASES

ARGUED AND DETERMINED IN THE

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OF

NORTH CAROLINA

AT

RALEIGH

THE COMMITTEE TO ELECT DAN FOREST, A POLITICAL COMMITTEE, PLAINTIFF
v.
EMPLOYEES POLITICAL ACTION COMMITTEE (EMPAC), DEFENDANT

No. COA17-569

Filed 19 June 2018

1. Jurisdiction—condition precedent—statutory requirement—agency complaint—timeliness of notice

The committee to elect a political candidate satisfied the statutory requirement of timely filing a notice of complaint with the State Board of Elections prior to bringing suit alleging a violation of a "stand by your ad" law governing political television advertisements. Evidence that the committee appropriately followed statutory procedure included a verified complaint stating when the committee sent its required notice to the state agency; the lack of a file stamp did not negate the jurisdiction of either the superior court or the Court of Appeals.

2. Constitutional Law—standing—injury—actual damage—breach of private right

The committee to elect a political candidate had standing to seek statutory damages for an alleged violation of a "stand by your ad" law regarding political television advertisements even though the candidate won the election, since at least nominal damages may be shown where a private right has been breached, even if no actual damages were inflicted aside from the breach itself. Here, the legislature had the authority to create a private right of action for political candidates and their committees to enforce its policy decision that political television ad sponsors be properly disclosed.

3. Damages and Remedies—statutory damages—not dependent on actual damages

A committee to elect a political candidate did not have to put forth evidence of actual damages in order to recover statutory damages for violation of a "stand by your ad" law governing political television advertisements where the legislature had authority to provide for statutory damages. While it is possible for statutory damages to be unconstitutionally excessive by being wholly disproportionate to the statutory violation, in this case the amount of statutory damages, if any, had yet to be determined.

4. Constitutional Law—facial challenge—political advertisements—disclosure law—content-based restriction

A state statute requiring political ads to disclose the identity of the ad sponsor's CEO or treasurer did not contain a content-based restriction violative of the First Amendment, based on U.S. Supreme Court precedent in *Citizens United v. FEC*, 558 U.S. 310 (2010).

Chief Judge McGEE dissenting.

Appeal by Plaintiff from order entered 15 February 2017 by Judge Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 16 October 2017.

Walker Law Firm, PLLC, by David "Steven" Walker, for the Plaintiff-Appellant.

Stevens Martin Vaughn & Tadych, PLLC, by C. Amanda Martin, for the Defendant-Appellee.

DILLON, Judge.

During the 2012 election cycle, a political advertisement sponsored by the Employees Political Action Committee ("EMPAC"), the political arm of the State Employees Association of North Carolina ("SEANC"), ran on television supporting Linda Coleman, Democratic candidate for Lieutenant Governor. The Committee to Elect Dan Forest (the "Committee") commenced this action seeking statutory damages, contending that EMPAC's television ad violated the "stand by your ad" law, which was still in effect during the 2012 campaign cycle.

The trial court granted summary judgment for EMPAC, concluding that the law was unconstitutional as applied because Mr. Forest could

not forecast any evidence that he suffered any *actual* damages, presumably because Mr. Forest won the election anyway. We reverse the trial court's order granting summary judgment and remand the matter for further proceedings consistent with this opinion.

I. Background

In 1999, the General Assembly enacted a "stand by your ad" law, codified in N.C. Gen. Stat. § 163-278.39A (hereinafter referred to as the "Disclosure Statute"), to regulate political advertisements. The Disclosure Statute required in relevant part that any television ad sponsored by a political action committee contain: (1) a "disclosure statement" identifying the sponsor of the ad spoken by *either* the sponsor's chief executive officer ("CEO") *or* its treasurer; and (2) a "full-screen picture containing [this] disclosing individual" featured during the disclosure statement. N.C. Gen. Stat. § 163-278.39A(b)(3) and (6) (2012).[1]

The Disclosure Statute creates the right for a candidate to seek statutory damages against an ad sponsor who runs a non-conforming ad in the candidate's race. N.C. Gen. Stat. § 163.278.39A(f).

In 2012, North Carolina's race for Lieutenant Governor featured two candidates: Dan Forest and Linda Coleman. EMPAC ran a television advertisement in support of Ms. Coleman during the 2012 election cycle. There is evidence in the Record that this ad's disclosure statement violated the Disclosure Statute in two different ways: (1) the picture of the disclosing individual was not a "full-screen" picture, but rather was much smaller; and (2) the disclosing individual depicted in the ad was neither EMPAC's CEO nor Treasurer, but was rather Dana Cope, the then-CEO of EMPAC's affiliate entity, SEANC.

Mr. Forest's Committee filed a notice of complaint with the State Board of Elections (the "SBOE"), whereupon EMPAC pulled the offending ad and ran a new ad for the remainder of the 2012 election cycle with a disclosure which complied with the Disclosure Statute. Mr. Forest won the 2012 election for Lieutenant Governor by a narrow margin of 6,858 votes out of over 4 million votes cast. After the election, Mr. Forest's Committee commenced this action seeking statutory damages against EMPAC for its nonconforming ad supporting Ms. Coleman. The trial court granted summary judgment to EMPAC. The Committee timely appealed.

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1. The Disclosure Statute was repealed by the General Assembly during its 2013 session, effective 1 January 2014. *See* Session Law 2013-381, § 44.1. Neither party made any argument concerning any effect the repeal may have had on the Committee's right to bring this action; and, therefore, we do not consider the issue.

II. Condition Precedent

[1] Before addressing the arguments of the parties, we address the argument raised by our dissenting colleague. Specifically, the Disclosure Statute requires that in order to preserve the right to bring an action for damages, a candidate's committee must first "complete and file a Notice of Complaint" *with the SBOE* regarding the nonconforming ad no later than three days after the election. N.C. Gen. Stat. § 163-278.39A(f)(1).[2] Our dissenting colleague contends that the Record fails to demonstrate that the Committee filed a notice of complaint with the SBOE by the Friday following the 2012 election as required by the Disclosure Statute.

We agree with our dissenting colleague that the requirement to file a notice of complaint with the SBOE is a statutory "condition precedent" which cannot be waived; that is, by the terms of the Disclosure Statute, it was a condition precedent to bringing this matter that Mr. Forest's Committee first have lodged a complaint with the SBOE regarding EMPAC's ad by the Friday following the election. *See Bolick v. American Barmag Corp.*, 306 N.C. 364, 368-69, 293 S.E.2d 415, 419 (1982). However, we disagree with our dissenting colleague that the Record lacks sufficient evidence to create an issue of fact that the Committee satisfied this condition precedent. Specifically, the Record contains a *verified* Complaint[3] in which the Committee alleges that it indeed sent a notice of complaint regarding EMPAC's nonconforming ad to the SBOE *before* the election, in late October 2012. Additionally, the Record contains a copy of this notice of complaint, which was attached as an exhibit to the verified Complaint. This notice of complaint is dated 26 October 2012, it states that it is being filed that same day, and it too is verified. There was no other evidence before the trial court at the summary judgment hearing concerning this issue; EMPAC never raised the issue at summary judgment nor has EMPAC raised the issue in its brief on appeal. Accordingly, we conclude that the Record shows that the Committee met its burden at summary judgment of presenting evidence that it timely filed a notice of complaint with the SBOE.

We note the dissent's argument concerning the lack of a file stamp of the SBOE on the copy of the notice of complaint contained in the

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2. The Disclosure Statute also requires a complaining candidate to bring the action within ninety (90) days of the election. Here, there is no dispute that Mr. Forest's committee brought action on 28 December 2012, well within ninety (90) days of the election. That action was dismissed pursuant to Rule 41; however, this present action was commenced within the time required in Rule 41.

3. The Committee's Complaint was verified by Mr. Forest.

Record. We disagree with the dissent that this lack of a file stamp is fatal to the Committee's claim. First, the lack of a file stamp does not bear on our *appellate* jurisdiction; and therefore, *Crowell v. State*, 328 N.C. 563 (1991) and *McKinney v. Duncan*, ___ N.C. App. ___, ___, 808 S.E.2d 509, 512 (2017), cited in the dissent, are inapposite. It is clear from the Record that our Court has *appellate* jurisdiction to consider the trial court's summary judgment.

Secondly, the lack of a file stamp was not fatal to the superior court's jurisdiction. Though the Committee bears the burden to show that it filed a notice of complaint with the SBOE within three days of the 2012 election, we note that providing a filed stamped copy of the notice is not the only way in which the Committee may meet its burden. Indeed, even the cases cited by our dissenting colleague, *State v. High*, 230 N.C. App. 330, 750 S.E.2d 9 (2013) and *State v. Moore*, 148 N.C. App 568, 559 S.E.2d 565 (2002), suggest that producing a file-stamped copy is not the *only* means to meet the burden of showing that a document was filed. These cases stand for the proposition that a trial court lacks jurisdiction to revoke a criminal defendant's probation based on a probation violation report which was not filed prior to the expiration of the defendant's probation period. In each case, we held that the State failed to meet its burden to show that the probation violation report was filed prior to the expiration of the defendant's probation period. However, we recognized that presenting a filed-stamped copy was not the only way which the State could have met its burden. For instance, in *High*, we vacated the trial court's order because "the [violation] reports were not filed stamped, *nor [was] there any other evidence in the record* indicating that the reports were actually filed within the period of probation." *High*, 230 N.C. App. at 336, 750 S.E.2d at 14 (emphasis added). And in *Moore*, we vacated the trial court's order, stating that "[i]n the absence of a filed stamped motion *or any other evidence of the motion's timely filing*[,] the trial court is without jurisdiction." *Moore*, 148 N.C. App. 570, 559 S.E.2d at 566 (emphasis added). But in the matter before us, though the copy of the notice of complaint in the Record lacks the file stamp of the SBOE, the Record does contain other evidence showing that the notice of complaint was timely filed with the SBOE, as outlined above.

III. Analysis

We now turn to the arguments raised by the parties in their appellate briefs. In this matter, the trial court granted summary judgment in favor of EMPAC on the Committee's claim for statutory damages, concluding that "in the absence of any forecast of actual demonstrable damages [suffered by Mr. Forest], the statute at issue is unconstitutional

as applied." In essence, the trial court did not declare the Disclosure Statute unconstitutional *per se*, but rather held that Mr. Forest lacked standing to seek damages under the Statute since he did not suffer any actual damages, apparently because he won the election.

On appeal, the Committee contends that the trial court erred in its ruling. EMPAC argues that the trial court correctly determined that the Disclosure Statute is unconstitutional as applied *and further argues* that the Disclosure Statute is unconstitutional on its face. We review these constitutional arguments *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) ("The standard of review for summary judgment is de novo."); *State ex rel. McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016) ("We review constitutional questions de novo.").

A. Dan Forest's Committee Has Standing To Seek Damages.

[2] The trial court essentially concluded that Dan Forest's Committee lacked standing to bring this suit based on the absence of any evidence that Mr. Forest suffered any actual damage. That is, because Mr. Forest *won* the 2012 election, he had no standing, in the constitutional sense, to seek statutory damages allowed under the Disclosure Statute. However, based on controlling precedent, it is clear that Mr. Forest's Committee does have standing: simply because Mr. Forest won his election does not mean that he did not suffer an injury sufficient in a constitutional sense to confer standing.

The North Carolina Constitution provides in regard to standing as follows:

> All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

N.C. Const. art. I, § 18 (emphasis added). According to our Supreme Court, "[t]he North Carolina Constitution confers standing on those who suffer harm[,]" *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 281 (2008), and that one must have suffered some "injury in fact" to have standing to sue, *Dunn v. Pate*, 334 N.C. 115, 119, 431 S.E.2d 178, 181 (1993).

Our Supreme Court has held in a variety of contexts that a party has standing to bring suit where a private right has been breached, even where the party has not suffered actual damages beyond that fact that a breach occurred. The breach itself is an "injury in fact." For instance, one has standing to seek nominal damages "where some legal right has

been invaded but no actual loss or substantial injury has been sustained. Nominal damages are awarded in recognition of the right and of the technical injury resulting from its violation." *Potts v. Howser*, 274 N.C. 49, 61, 161 S.E.2d 737, 747 (1968). A party to a contract has standing to bring suit where the other party has breached the contract, even if no actual damage is shown. *Kirby v. Stokes County*, 230 N.C. 619, 627, 55 S.E.2d 322, 327 (1949). An owner of land has the right to exclusive possession of his property and has standing to bring suit against anyone who trespasses, even where the owner suffers no actual damage; the owner's legal right to exclusive enjoyment of his property has been invaded. *Hildebrand v. Southern Bell*, 219 N.C. 402, 408, 14 S.E.2d 252, 257 (1941) (holding that a landowner "is entitled to be protected as to that which is his without regard to its money value").

If EMPAC had *slandered* Mr. Forest in its political ad, Mr. Forest would have had standing to seek at least nominal damages for this tort, even though he won the election. *Wolfe v. Montgomery Ward*, 211 N.C. 295, 296, 189 S.E.2d 772, 772 (1937) (holding that a plaintiff who has been slandered has standing to seek nominal damages even where there is no evidence that he suffered actual damages).

The private right at issue in the present case was not one that existed at common law but rather was one created by our General Assembly in the Disclosure Statute to provide an enforcement mechanism. This private right is a right expressly conferred by our General Assembly on a candidate to participate in an election where sponsors of political ads supporting his or her opponent must make themselves known to the public in their ads. The General Assembly acted within its authority to create a private right not recognized in the common law:

> The legislative branch of government is without question the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule[.]

Rhyne v. K-Mart Corp., 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004). *See also Bumpers v. Cmty. Bank*, 367 N.C. 81, 88, 747 S.E.2d 220, 226 (2013) (recognizing our General Assembly's authority to prohibit unfair and deceptive trade practices and to create a private cause of action in favor of a class of individuals to enforce this prohibition).

Our Court has held that a party has standing to sue for *statutory* damages without having to demonstrate actual damages where the statute at issue creates a private cause of action as a mechanism to enforce

the provisions of the statute at issue. *See Addison v. Britt*, 83 N.C. App. 418, 421, 350 S.E.2d 158, 160 (1986) (Chief Judge Eagles, joined by future Chief Justice Parker and future Justice Webb, writing that "[o]nce a violation of an actionable portion of the [Truth In Lending Act] is established, the debtor is entitled to recover statutory damages [and that b]ecause the purpose of that section is to encourage private enforcement of the Act, proof of actual damages is unnecessary").

Concerning the Disclosure Statute at issue here, in 2012, in an opinion joined by Judge (now Justice) Beasley, our Court recognized that by enacting the Disclosure Statute in 1999, the General Assembly made the policy decision to create disclosure rules in political advertising and to enforce those rules through a "private cause of action," by which candidates may seek statutory damages when those rules have been broken. *Friends of Queen v. Hise*, 223 N.C. App. 395, 735 S.E.2d 229 (2012) (footnote 7). The General Assembly expressly created a private right of action for political candidates and their committees to enforce its policy decision to require that political television ad sponsors be properly disclosed. It is equally clear that a candidate suffers an "injury in fact" for a breach, even a technical breach, of this right when an ad is run in the candidate's election which runs afoul of the Disclosure Statute. This "injury in fact" is a breach of a private right similar to a breach of a private right suffered by a party to a contract who has suffered a breach by the other party to that contract, or by a landowner whose land has been trespassed upon, or by an individual who has been slandered. Even though there may not be any other actual damage, like the loss of an election; the breach of the private right, itself, constitutes an injury which provides standing to seek recourse.[4]

We are not to be concerned with the "wisdom or expediency" of the Disclosure Statute, but rather we are only concerned with whether the General Assembly had the "power" to enact the law. *In re Denial*, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982). We conclude that the General Assembly acted within its authority in 1999 when it enacted the Disclosure Statute to require that political ads disclose their sponsors and to provide the committee of a political candidate running for office with a private cause of action to seek damages against the sponsor

4. The United States Supreme Court has recently explained that an "injury in fact" need not be "tangible" for standing to exist. *Spokeo v. Robins*, 136 S. Ct. 1540, 1549 (2016). *Spokeo* addressed the issue of standing in the federal context. Our Supreme Court has instructed that federal cases may be instructive, though they are not binding, noting that "the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine." *Goldston v. State*, 361 N.C. 26, 35, 637 S.E.2d 876, 882 (2006).

of a nonconforming ad, just as we conclude that the General Assembly acted within its authority in 2013 to repeal the law.

B. Dan Forest's Committee May Seek Statutory Damages Without Showing Evidence of Actual Damage.

[3] Having concluded that Mr. Forest's Committee has standing to bring this action, we now consider whether the Committee may recover the statutory damages provided under the Disclosure Statute without presenting any evidence that Mr. Forest suffered any actual monetary damages.

The Disclosure Statute provides that a candidate receiving a favorable verdict is entitled to statutory damages equal to the "total dollar amount" spent by the ad sponsor to air the nonconforming ad. N.C. Gen. Stat. § 163-278.39A(f)(2). In this case, while the exact amount EMPAC spent on the nonconforming ad has yet to be determined, EMPAC argues that *any* amount of statutory damages would be an unconstitutional "windfall" to Mr. Forest's Committee, since Mr. Forest won the election. The Committee, though, argues that the statutory damages imposed by the Disclosure Statute is not unconstitutional "as applied" here *even if* the Committee fails to present evidence of actual quantifiable damages.

We conclude that the General Assembly has the authority to provide for statutory damages and, therefore, that the Committee may seek statutory damages. Specifically, our Court has recognized this authority in the context of the Disclosure Statute. *See Friends of Queen*, *supra*. There are other contexts where an award of statutory damages, without a showing of actual damages, has been sustained. *See*, *e.g.*, *Simmons v. Kross Lieberman*, 228 N.C. App. 425, 431, 746 S.E.2d 311, 315 (2013) (holding that a party may recover a civil penalty as provided by statute without showing actual damages for violations of our Debt Collection Act under Chapter 58); *State v. Beckham*, 148 N.C. App. 282, 558 S.E.2d 255 (2002) (holding that an award of statutory damages of $150 under N.C. Gen. Stat. § 1-538.2, where actual damages shown was less, was civil in nature and appropriate); *see also* N.C. Gen. Stat. § 25-9-625(e) (providing that debtors may recover $500 per violation).[5]

5. In the federal context, there are a number of situations where a plaintiff may recover statutory damage relief without any showing of actual damages: the Copyright Act (17 U.S.C. § 504(c)) which allows a plaintiff to recover between $750 and $30,000 for each act of infringement instead of actual damages; the Cable Piracy Act (47 U.S.C. § 605(e)) which allows a plaintiff to recover between $1,000 and $10,000 in lieu of actual damages; the Anti-Cybersquatting Consumer Protection Act (15 U.S.C. § 1125(d)) which allows a plaintiff to recover between $1,000 and $100,000 from any person who registers in bad

Furthermore, statutory damages which may exceed a plaintiff's actual damages are not unconstitutional unless the statutory damage award "prescribed is so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable." *St. Louis v. Williams*, 251 U.S. 63, 66-67 (1919). Our Supreme Court has recognized this principle. *N.C. School Board v. Moore*, 359 N.C. 474, 496-97, 614 S.E.2d 504, 517-18 (2004) (recognizing the principle that "rough justice, not absolute precision, was sufficient in evaluating the amount of [statutory] damages so long as the amount of the penalty was not severely disproportionate [to the actual damages]").

Therefore, we conclude that the Committee need not put forth evidence of actual damages in order to seek statutory damages. Such is not required in other contexts where statutory damages are allowed. However, we recognize that there may be situations where an award of statutory damages might be unconstitutionally excessive and would need to be reduced. For example, if a political action committee spent $1 million running an ad which did not feature the picture of the disclosing individual until a second after the disclosure statement commenced (where the Disclosure Statute requires the picture be displayed "*throughout the duration* of the disclosure statement"), an award of $1 million might be deemed unconstitutionally excessive. Such an award may be viewed as "oppressive" and "wholly disproportionate" to such a minor technical violation, and it might be appropriate to reduce such award.

But, here, it could be argued that EMPAC's violation was more substantial. Specifically, it is possible that having Dana Cope, a then-popular executive director of EMPAC's affiliate entity, SEANC, shown as the disclosing individual may have given the ad a level of gravitas that it would not have enjoyed if an unknown officer of EMPAC had been depicted. We conclude, however, that it is premature to decide whether the statutory damages allowed under the Disclosure Statute would be unconstitutionally excessive in this case, as *the amount* of statutory damages, if any, has yet to be determined.

C. The Disclosure Statute is Facially Constitutional.
(First Amendment Challenge)

[4] EMPAC argues, as an alternate legal ground to support the trial court's summary judgment, that the Disclosure Statute is unconstitutional *on*

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faith a domain name that is confusingly similar to the plaintiff's distinctive mark; and the Fair Debt Collection Practices Act of 1978 (15 U.S.C. § 1692k(a) which allows plaintiffs to recover from debt collectors as much as $1,000 per violation of the Act's requirements.

its face. Specifically, EMPAC contends that the Disclosure Statute constitutes a content-based restriction on speech, in violation of the First Amendment, because it requires that political ads contain a disclosure, while not requiring other forms of advertisement to contain a disclosure. We must disagree. Specifically, the United States Supreme Court has expressly held that a law requiring a disclaimer or a disclosure identifying the sponsor of a political ad is *not* a content-based restriction on speech requiring strict scrutiny review. *Citizens United v. FEC*, 558 U.S. 310, 366 (2010) ("Disclaimer and disclosure requirements . . . 'do not prevent anyone from speaking.' ") (quoting *McConnell v. FEC*, 540 U.S. 93, 201 (2003)). Rather, the Court held that such laws limit only the *manner* of speech and are, therefore, subject only to "exacting scrutiny" review. *Citizens United*, 558 U.S. at 366. And we are bound by that determination.

To survive "exacting scrutiny" review, which is generally considered to be synonymous with "intermediate scrutiny" review, the law "need not [provide] the least restrictive or least intrusive means" of reaching a government objective. *Ward v. Rock Against Racism*, 491 U.S. 781, 784 (1989). Rather, there need only be a "substantial relation" between the law and a "sufficiently important" governmental interest. *Citizens United*, 558 U.S. at 366-67.

In *Citizens United*, the Court found that a law requiring disclosures in political advertising can survive "exacting scrutiny" review "based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending," *Id.* at 367, and that such disclosures "permit[] citizens and shareholders to react to the speech of corporate entities in a proper way, [which] enables the electorate to make informed decisions and give proper weight to different speakers and messages," *Id.* at 371.

The Disclosure Statute here, requiring a sponsor's CEO or treasurer read a short disclaimer while his or her picture is displayed, is similar to and not any more onerous than the statute sustained by the United States Supreme Court in *Citizens United*, a statute which required that political ads contain a disclosure statement which:

> [M]ust be made in a "clearly spoken manner," and displayed on the screen in a "clearly readable manner" for at least four seconds. It must state that the communication "is not authorized by any candidate or candidate's committee"; it must also display the name and address (or Web site address) of the person or group that funded the advertisement.

Id. at 366. EMPAC's argument concerning the facial validity of the Disclosure Statute is, therefore, overruled.

IV. Conclusion

This matter involves the partisan political process. And there is an element of political irony; a Republican invoking a law passed by a Democratic-controlled General Assembly and later repealed by a Republican-controlled General Assembly. However, our job is not to consider the politics of the parties involved. Rather, our job is simply to apply the law, irrespective of politics.

Applying the law, we must conclude that our General Assembly acted within its authority in 1999 when it enacted the Disclosure Statute, creating a private cause of action in favor of political candidates against the sponsors of political ads who fail to properly disclose their identity, just as the General Assembly acted within its authority when it took away this statutory right in 2013. Therefore, we must conclude that the trial court erred in granting summary judgment in favor of EMPAC. We reverse the order of the trial court and remand the matter for further proceedings consistent with this opinion. In so ordering, we note that whether the Disclosure Statute is unconstitutional as applied because the amount of statutory damages allowed thereunder is unconstitutionally excessive is not before us since the amount of statutory damages has yet to be determined in this case.

REVERSED AND REMANDED.

Judge CALABRIA concurs.

Chief Judge McGEE dissents.

McGEE, Chief Judge, dissenting.

Because I believe this Court lacks subject matter jurisdiction over the appeal, I respectfully dissent. This Court lacks jurisdiction to consider Plaintiff's appeal for two reasons: (1) Plaintiff has failed to demonstrate that it had standing to initiate this action, and (2) Plaintiff has failed to prove that it met a condition precedent required for the trial court to obtain subject matter jurisdiction.

I. Standing

Plaintiff failed in its burden of demonstrating that it had standing to bring the present action. Because I believe the necessary elements of

standing, as set forth in the appellate opinions of this State, are based on rights and protections guaranteed by the North Carolina Constitution, I do not believe the General Assembly is empowered to confer standing on plaintiffs that have not alleged any actual harm.

The majority opinion repeatedly states its assumption that the trial court based its ruling on a determination that "because Dan Forest won his election . . . he did not suffer an injury sufficient in a constitutional sense to confer standing." However, the trial court did not reference the outcome of the election anywhere in its order – it simply stated that "Plaintiff has failed to allege any forecast of damage other than speculative damage." More importantly, the reasoning of the trial court is not relevant to our standing review. My analysis is based solely upon the allegations in Plaintiff's 9 March 2016 Complaint ("Plaintiff's Complaint").

"No person shall be . . . in any manner deprived of his . . . property, but by the law of the land." N.C. Const. art. I, § 19. "[U]nder the law of the land clause of the State Constitution a judgment of a court cannot bind a person unless he is brought before the court in some way sanctioned by law[.]" *Eason v. Spence*, 232 N.C. 579, 586, 61 S.E.2d 717, 722 (1950) (citations omitted). "All courts shall be open; every person for an *injury* done him in his lands, goods, person, or reputation shall have remedy by due course of law[.]" N.C. Const. art. I, § 18. "As a general matter, the North Carolina Constitution confers standing on *those who suffer harm*[.]" *Willowmere Cmty. Ass'n v. City of Charlotte*, __ N.C. __, __, 809 S.E.2d 558, 561 (2018) (quoting art. I, § 18 and *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 642, 669 S.E.2d 279, 281 (2008)) (emphasis added). Therefore, the North Carolina Constitution does not confer standing on those who *have not suffered harm*. *Id.*

In order to establish standing to bring this action based on violations of N.C. Gen. Stat. § 163-278.39A, Plaintiff was required to meet two separate burdens: (1) prove that it was a party authorized to bring the action pursuant to the requirements of the statute itself, *see*, *e.g.*, *Applewood Props., LLC v. New S. Props., LLC*, 366 N.C. 518, 522–24, 742 S.E.2d 776, 779-80 (2013), and (2) prove that it met the general constitutional standing requirements as determined by our appellate courts. *See*, *e.g.*, *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 175, 684 S.E.2d 41, 52 (2009); *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 390–91, 617 S.E.2d 306, 310 (2005), *aff'd per curiam*, 360 N.C. 398, 627 S.E.2d 461 (2006). "Since standing is a jurisdictional requirement, the party seeking to bring [its] claim before the court must include allegations which demonstrate why [it] has standing in the particular case[.]" *Cherry v. Wiesner*, __ N.C. App. __, __, 781 S.E.2d 871, 877, *disc. review denied*,

369 N.C. 33, 792 S.E.2d 779 (2016) (citations omitted). The allegations in Plaintiff's complaint were sufficient to meet Plaintiff's first burden, but insufficient to meet its second.

North Carolina courts are not constitutionally bound by the standing jurisprudence established by the United States Supreme Court. *See*, *e.g.*, *Cedar Greene, LLC v. City of Charlotte*, 222 N.C. App. 1, 17, 731 S.E.2d 193, 204–05 (2012), *rev'd*, 366 N.C. 504, 739 S.E.2d 553 (2013) (adopting Court of Appeals dissent in appeal from declaratory action challenging constitutionality of a statute); *but see Dunn v. Pat*e, 334 N.C. 115, 119, 431 S.E.2d 178, 181 (1993) (citation omitted) (Our Supreme Court, in determining the issue of standing in a constitutional challenge to a statute, stated: "The [Court of Appeals] correctly stated that the petitioner 'must allege she has sustained an "injury in fact" as a direct result of the statute to have standing.' "). However, since at least the 1960s, our courts, both trial and appellate, have applied requirements established by the United States Supreme Court to the standing jurisprudence of this State. *See*, *e.g.*, *id.*; *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990); *Stanley v. Dept. Conservation & Development*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973).

When this Court or our Supreme Court adopts a standard from another jurisdiction and applies that standard in order to decide an issue before it, that standard becomes part of the holding, and part of the law of this State. Therefore, though standing requirements set by the United States Supreme Court are not inherently binding on this Court, they become binding once adopted and applied by our appellate courts in order to decide an issue. Both this Court and our Supreme Court have adopted and applied federal standing requirements for decades, and this Court is bound by those adopted standards as much as it is bound by the common law standards that developed independently in this State.[1]

When discussing the underlying requirements for demonstrating standing in regular civil actions, this Court has repeatedly held that

> [t]he irreducible constitutional minimum of standing [is]: (1) "injury in fact" – an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or

1. I refer only to standards found in opinions with precedential value, and to those standards that constitute holdings in that the application of the standard was "necessary to the decision." *See Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) (citations omitted) (distinguishing holdings from *obiter dictum* by stating: "Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby.").

> imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Teague v. Bayer AG, 195 N.C. App. 18, 22, 671 S.E.2d 550, 554 (2009) (citations and quotation marks omitted). Because federal constitutional standards do not dictate standing requirements in North Carolina, the "irreducible constitutional minimum" discussed in *Teague* and other opinions must logically refer to the minimum requirements of the North Carolina Constitution. *See* N.C. Const. art. I, § 18; *Willowmere*, __ N.C. at __, 809 S.E.2d at 561. Our Supreme Court has recognized "injury in fact" as a required element of standing in opinions filed both prior and subsequent to *Cedar Greene*. *See Hart v. State*, 368 N.C. 122, 140, 774 S.E.2d 281, 293–94 (2015); *Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 590, 447 S.E.2d 768, 780–81 (1994).

A recent United States Supreme Court opinion, *Spokeo, Inc. v. Robins*, __ U.S. __, 194 L. Ed. 2d 635 (2016), addressed the issue presently before us – whether standing can be created by statute for plaintiffs that cannot meet the general constitutional standing requirements. In *Spokeo*, the Court held that the plaintiff's burden to prove injury-in-fact *cannot* be abolished by statute. *Id.* at __, 194 L. Ed. 2d at 646 (citations omitted). The Court held: "Injury in fact is a constitutional requirement, and '[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.' " *Id.* at __, 194 L. Ed. 2d at 643-44. The injury-in-fact standard applied in *Spokeo* is the same that this Court applies: " 'To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Spokeo*, __ U.S. at __, 194 L. Ed. 2d at 644 (citation omitted). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.' " *Id.* (citations omitted). "Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be 'concrete.' " *Id.* "A 'concrete' injury must be '*de facto*'; that is, it must actually exist. When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term – 'real,' and not 'abstract.' " *Id.* at __, 194 L. Ed. 2d at 644-45 (citations omitted); *compare Teague*, 195 N.C. App. at 22, 671 S.E.2d at 554. The "*de facto*" requirement is also recognized by this Court. *See Coker*, 172 N.C. App. at 391–92, 617 S.E.2d at 310 (citations omitted) (emphasis removed) (defining "injury in fact" as an injury that is "concrete and particularized and

. . . actual or imminent, not conjectural or hypothetical[,]" "distinct and palpable" and not "abstract").

In *Spokeo*, the Court recognized that "the violation of a procedural right granted by statute *can* be sufficient *in some circumstances* to constitute injury in fact[,]" *Spokeo*, __ U.S. at __, 194 L. Ed. 2d at 646 (emphasis added), but that "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* at __, 194 L. Ed. 2d at 645. The Court held that because the Ninth Circuit failed to consider whether violation of the *specific procedures* alleged in Robins' complaint constituted a sufficiently concrete harm, remand was required.

> On the one hand, Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk. On the other hand, Robins cannot satisfy the demands of Article III by alleging a bare procedural violation [because] *violation of . . . FCRA's procedural requirements may result in no harm.*

Id. at __, 194 L. Ed. 2d at 646 (emphasis added). The Court held that the relevant analysis was "whether the particular procedural violations alleged *in this case* entail *a degree of risk sufficient to meet the concreteness requirement.*" *Id.* (emphasis added). Stated differently:

> [A]n alleged procedural violation can by itself manifest concrete injury where Congress conferred the procedural right to protect a plaintiff's concrete interests and where the procedural violation presents a "risk of real harm" to that concrete interest. But even where Congress has accorded procedural rights to protect a concrete interest, a plaintiff may fail to demonstrate concrete injury where violation of the procedure at issue presents no material risk of harm to that underlying interest.

Strubel v. Comenity Bank, 842 F.3d 181, 190 (2d Cir. 2016) (citing and paraphrasing *Spokeo*). In the wake of *Spokeo*, multiple federal jurisdictions have held that minor or technical violations of statutes do not satisfy the injury-in-fact requirement. *See, e.g.*, *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 346 (4th Cir. 2017) ("As *Spokeo* demonstrated, a statutory violation absent a concrete and adverse effect does not confer standing."); *Kleg v. SP Plus Corp.*, 2018 WL 1807012 (N.D. Ga. Mar. 5, 2018) (including thorough review of federal district and circuit courts that have found no standing for non-injurious statutory violations).

I believe the North Carolina Constitution requires the same level of particularization and concreteness with regard to statutory violations.[2] *See*, *e.g.*, *Empire Power*, 337 N.C. at 590, 447 S.E.2d at 780–81 (citation omitted) (emphasis added) ("the 'procedural injury' implicit in the failure of an agency to prepare an environmental impact statement was itself a sufficient '*injury in fact*' to support standing as an 'aggrieved party' under former N.C.G.S. § 150A–43, *as long as* such injury was alleged by a plaintiff having sufficient geographical nexus to the site of the challenged project that *he might be expected to suffer whatever environmental consequences the project might have*.").

In the present case, Plaintiff argues, and the majority opinion agrees, that allegation of a "bare procedural violation" of N.C.G.S. § 163-278.39A was sufficient to confer standing. Plaintiff contends in its reply brief: "In light of [N.C.G.S. § 163-278.39A], the General Assembly has declared that a candidate has been injured when an opposing organization fails to follow advertising disclosure laws. Thus, there is injury in fact [in this case.]" Plaintiff further contends that because the General Assembly created a private cause of action as the enforcement mechanism for N.C.G.S. § 163-278.39A, the General Assembly eliminated the need to show "actual demonstrable damages:" "[W]hen [the General Assembly] created [N.C.G.S.] § 163-278.39A (2011), by modifying the common law requirement that actual damages must be demonstrable, it provided a different way to calculate otherwise incalculable actual damages." To the extent, if any, that Plaintiff is using "damages" to mean "injury," conflating these terms is incorrect. "[T]he term 'wrong' has a legal signification distinct from 'damage,' and is synonymous with '*injuria*' – signifying a legal injury – hence the maxim *damnum absque injuria*, which 'is used to designate damage which is not occasioned by anything which the law esteems an injury.' " *Thomason v. R. R.*, 142 N.C. 318, 330, 55 S.E. 205, 209–10 (1906) (citations omitted). It was evidence of injury, not damages, that Plaintiff was required to properly plead in order to confer standing.

The General Assembly unquestionably has the authority to supplant common law through legislation. However, I do not agree that this State's standing requirements are susceptible to abrogation through legislative enactments – they are the minimum constitutional requirements a plaintiff must satisfy in order to *force a defendant into court*. *Mangum*, 362 N.C. at 642, 669 S.E.2d at 281-82; *see also* N.C. Const. art. I, §§ 18 and 19;

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2. In contrast, the majority opinion holds that "even a technical breach" of N.C.G.S. § 163-278.39A constitutes a *per se* injury in fact.

N.C. Const. art. IV, § 1 ("The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government[.]"); *City of Asheville v. State of N.C.*, 369 N.C. 80, 88, 794 S.E.2d 759, 766 (2016) (citations and quotation marks omitted) ("[i]f there is a conflict between a statute and the Constitution, this Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution").

I cannot locate any other enactment by the General Assembly that has created a private right of action conferring standing on a plaintiff without requiring any showing of a particularized and concrete injury proximately caused by an act of the defendant. For example, N.C. Gen. Stat. § 75-16 (2017) of our Unfair and Deceptive Practices Act specifically requires an allegation of injury, and this Court has held that a plaintiff must allege facts in support of *both* the standing requirements created by the legislation, *and* the constitutional requirements for standing. *Coker*, 172 N.C. App. at 391, 401, 617 S.E.2d at 310, 316, *aff'd per curiam*, 360 N.C. 398, 627 S.E.2d 461.

In *Friends of Queen*, this Court recognized the peculiarity of the use of a *private cause of action* as an enforcement mechanism for violations of N.C.G.S. § 163-278.39A:

> The enforcement mechanism chosen by our legislature is *unique in the world of election law*. Many other jurisdictions have analogous disclosure laws. However, after diligent searching, it appears that *North Carolina has the only statute that provides candidates with a private cause of action against their opponents for advertising disclosure violations, rather than enforcement through government-enforced criminal or civil penalties.*

Friends of Joe Sam Queen v. Ralph Hise for N.C. Senate, 223 N.C. App. 395, 403 n.7, 735 S.E.2d 229, 235 n.7 (twelve citations to statutes from different jurisdictions omitted) (emphasis added). It is this unprecedented use in N.C.G.S. § 163-278.39A of a *private cause of action* to enforce what was essentially a *public right* to information that is responsible for the unique standing issue now before us. As suggested by *Friends of Queen*, 223 N.C. App. at 403 n.7, 735 S.E.2d at 235 n.7, it is the State, not private entities, that has the superior interest in enforcing public rights, and the inherent standing to do so.

I do not agree that N.C.G.S. § 163-278.39A was enacted to create or enforce "a political candidate's right to participate in a campaign where

sponsors of political ads supporting his or her opponent must make themselves known to the public in their ads." The majority opinion suggests that N.C.G.S. § 163-278.39A was intended to create a private, rather than public, right. If this were true, it would represent a complete break with the traditional state interests motivating the enactment of disclosure statutes, and would raise concerning constitutional questions. Political disclosure laws have been enacted, and constitutionally justified, as a means to enforce the *public's* right to access relevant information concerning political candidates. In fact, it is this governmental interest in ensuring an informed electorate that serves to provide constitutional justification for the coincident invasion of First Amendment rights associated with political disclosure statutes:

> In this case, the state interest at stake is that of "provid[ing] the electorate with information as to where political campaign money comes from and how it is spent." *Buckley*, 424 U.S. at 66, 96 S.Ct. 612 (internal quotation marks omitted). This "informational interest" is sufficiently important to support disclosure requirements. In *Buckley*, the Court recognized that campaign finance disclosure was a critical tool for maintaining transparency in the political marketplace: "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." Disclosure requirements advance the public's interest in information by "allow[ing] voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches." By revealing "the sources of a candidate's financial support," disclosure laws "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office."

Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 477–78 (7th Cir. 2012) (citations omitted); *see also State v. Wright*, 206 N.C. App. 239, 243, 696 S.E.2d 832, 836 (2010) ("the whole purpose of the campaign finance laws is to make the information available to the public at all times for voters' review"). It is at least in question whether the majority opinion's stated interpretation of N.C.G.S. § 163-278.39A – that it created a private right for the political candidates themselves instead of a public right for the electorate – would serve to justify the countervailing First

Amendment rights involved. *See*, *generally*, *Davis v. FEC*, 554 U.S. 724, 744, 171 L. Ed. 2d 737, 754-55 (2008). Although N.C.G.S. § 163-278.39A created a private cause of action, that cause of action was created to protect a *public*, not private, right – the right to insure an informed electorate. Under federal standing jurisprudence, "Congress cannot authorize private plaintiffs to enforce *public* rights in their own names, absent some showing that the plaintiff has suffered a concrete harm particular to him." *Spokeo*, __ U.S. at __, 194 L. Ed. 2d at 650 (Justice Thomas concurring).[3] I would hold that no less requirement should be applied here.

The majority opinion holds: "It is . . . clear that a candidate suffers an 'injury in fact' for a breach, even a technical breach, . . . when an ad is run which runs afoul of the Disclosure Statute." Though "intangible" injuries, such as violations of fundamental rights, can confer standing to pursue a statutorily created cause of action, it is only those intangible injuries that *meet minimum constitutional requirements* that can do so. *Spokeo*, __ U.S. at __, 194 L. Ed. 2d at 646. Neither Plaintiff, nor the majority opinion, indicates which allegations in Plaintiff's complaint meet the minimum requirements set forth in *Hart*, 368 N.C. at 140, 774 S.E.2d at 293–94, *Teague*, 195 N.C. App. at 22, 671 S.E.2d at 554, or any other appellate opinion of this State. I can identify no allegation of any harm in Plaintiff's complaint that is "*de facto*," or otherwise "real, and not abstract," "conjectural or hypothetical." *Coker*, 172 N.C. App. at 391–92, 617 S.E.2d at 310. Nor can I identify how the alleged violations constitute a particularized harm that " 'affect[s] [P]laintiff in a personal and individual way.' " *Spokeo*, __ U.S. at __, 194 L. Ed. 2d at 644 (citation omitted).

There is *nothing* inherently injurious to Plaintiff that flows from Defendant's alleged violations of N.C.G.S. § 163-278.39A. Plaintiff's two allegations are that Defendant failed to include in its television advertisement "an unobscured, full-screen picture containing the disclosing individual, either in photographic form or through the actual appearance of the disclosing individual on camera, . . . featured throughout the duration of the disclosure statement[,]" and that the disclosure statement was not "spoken by the chief executive officer or treasurer of the political action committee[.]" Plaintiff's own argument on appeal illustrates the "abstract or conjectural or hypothetical" nature of any potential injury suffered by Plaintiff. Plaintiff states: "It is difficult to prove

3. For an in depth review of the differing standing requirements attached to "private" and "public" rights, *see Spokeo*, __ U.S. at __, 194 L. Ed. 2d at 647-50.

whether the offending advertisements closed the electoral gap and led to [Plaintiff] being required to hire a legal team to monitor provisional vote counting and prepare for the possibility of a recount." Whether the advertisements were in some general sense effective in "closing the electoral gap" is, of course, irrelevant. In order to make an argument of relevance, Plaintiff would have had to allege that *the manner in which the alleged violations of N.C.G.S. § 163-278.39A altered the television advertisement* negatively impacted Plaintiff's campaign in some tangible manner, or otherwise resulted in actual injury. However, Plaintiff's complaint failed to allege even this hypothetical injury.

The majority opinion cites *Kirby v. Board of Education*, 230 N.C. 619, 55 S.E.2d 322 (1949), *Hildebrand v. Telegraph Co.*, 219 N.C. 402, 14 S.E.2d 252 (1941), and *Wolfe v. Montgomery Ward & Co.*, 211 N.C. 295, 189 S.E. 772 (1937), for the proposition that violations of N.C.G.S. § 163-278.39A(3) and (6) constituted injury sufficient to confer standing, because "a party has standing to bring suit where a private right has been breached, even where the party has not suffered actual damages beyond the fact that a breach occurred." As argued above, I believe N.C.G.S. § 163-278.39A(3) and (6) created public rights, not any private rights in Plaintiff (or in Mr. Forest). Further, damages and injury are not synonymous, and the well-established common law causes of action at issue in *Kirby*, *Hildebrand*, and *Wolfe* – breach of contract, trespass, and slander – are in no manner similar to violations of the (then) newly created statutory provisions of N.C.G.S. § 163-278.39A. In certain instances, an allegation that a defendant committed a particular tort is itself an allegation of an injury-in-fact. *Spokeo*, __ U.S. at __, 194 L. Ed. 2d at 647 (Justice Thomas concurring) (citations omitted) (" 'Private rights' have traditionally included rights of personal security (including security of reputation), property rights, and contract rights. In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded. Thus, when one man placed his foot on another's property, the property owner needed to show nothing more to establish a traditional case or controversy. Many traditional remedies for private-rights causes of action – such as for trespass, infringement of intellectual property, and unjust enrichment – are not contingent on a plaintiff's allegation of damages beyond the violation of his private legal right."). Breach of contract, trespass, and slander also fall into this category, and when a plaintiff proves the tort but fails to prove actual *damages*, nominal damages are awarded to acknowledge the *injury* committed. *Hildebrand*, 219 N.C. at 408, 14 S.E.2d at 257 (emphasis added) ("The fact that the

injury may be trivial, though material in determining the amount of the owner's damages, does not affect his constitutional rights or the principle of law involved. He is entitled to be protected as to that which is his without regard to its money value."). This difference between traditional common law private causes of action, and causes of action created by statute, has long been recognized and, unlike breach of contract, trespass, or slander, violations of N.C.G.S. § 163-278.39A(3) and (6) could not have resulted in *per se* injury to Plaintiff.

The majority opinion cites *Addison v. Britt*, 83 N.C. App. 418, 350 S.E.2d 158 (1986), involving the federal Truth in Lending Act. *Addison* was decided long before *Spokeo* and, as cited above, multiple federal courts have since applied *Spokeo* to find lack of standing on similar facts. Further, this Court *expressly declined* to address the issue for which the majority opinion cites *Addison*:

> Whether liability attaches to creditors for technical or minor violations of the Act is subject to some dispute among the various jurisdictions. We need not decide the question of whether "technical" violations of the actionable provisions of section 1638 give rise to creditor liability since, in any event, the particular violation we address here *is not technical in nature*.

Id. at 420, 350 S.E.2d at 159 (citation omitted) (emphasis added).

I disagree with the majority opinion's contention that footnote 7 of *Friends of Queen* supports a finding of standing in the present case. This footnote more accurately recognizes the novelty of the private cause of action enforcement mechanism included in N.C.G.S. § 163-278.39A(f), and thereby anticipated the standing issue now before us. Finally, Plaintiff fails to make any argument that "it is likely, as opposed to merely speculative, that the [alleged] injury will be redressed by a favorable decision." *Teague*, 195 N.C. App. at 22, 671 S.E.2d at 554. I cannot identify an injury, much less how a monetary award could redress any "injury" resulting from violations of N.C.G.S. § 163-278.39A(3) or (6). Because I would hold that Plaintiff has failed in its burden of proving standing, I would dismiss Plaintiff's appeal. *Stanley*, 284 N.C. at 28–29, 199 S.E.2d at 650.

II. Condition Precedent

Plaintiff filed the record in this appeal on 2 June 2017. In Plaintiff's Complaint, Plaintiff alleged it had "alerted the State Board of Election[s]

[(the 'Board')] of [] Defendant's violation" of N.C.G.S. § 163-278.39A(b)(6),[4] and stated that "[t]he filing of the Notice of Complaint on October 25, 2012 has preserved [] Plaintiff's right to bring this action[.]" The Notice of Complaint was signed and notarized on 26 October 2012, but it does not include a file stamp or any other method by which this Court can determine when or if it was actually filed with the Board. We allowed amendment of the record on 23 March 2018, but the copy of the Notice of Complaint included therein was identical to the copy already in the record – lacking a file stamp.

N.C. Gen. Stat. § 163-278.39A(f)(1), which created the cause of action, stated:

> Any plaintiff candidate in a statewide race in an action under this section *shall complete and file a Notice of Complaint Regarding Failure to Disclose on Television or Radio Campaign Advertising* with the State Board of Elections after the airing of the advertisement but *no later than the first Friday after the Tuesday on which the election occurred. . . . . The timely filing of this notice preserves the candidate's right to bring an action* in superior court any time within 90 days after the election.

Id. (emphasis added); *see also Friends of Queen*, 223 N.C. App. at 400 n. 4, 735 S.E.2d at 233 n. 4 ("The plaintiff must . . . file the necessary notices under § 163–278.39A(f) to preserve the right to bring the action."). The majority opinion agrees that the filing requirement in N.C.G.S. § 163-278.39A(f)(1) constituted a statute of repose, or a jurisdictional condition precedent to the initiation of the present action.

Our Supreme Court has discussed the difference between statutes of limitations – enforcement of which may be waived – and statutes of repose – which are unwaivable conditions precedent to the right to initiate an action:

> Generally, a statute of limitations has been recognized as a procedural bar to a plaintiff's action, which "does not begin to run until after the cause of action has accrued and the plaintiff has a right to maintain a suit." It also has been long recognized that certain time limitations may operate, not as procedural bars after an action has accrued, but as conditions precedent to the action itself.

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4. The Notice of Complaint references both N.C.G.S. § 163-278.39A(b)(3) and (6), but only alleges a violation of N.C.G.S. § 163-278.39A(b)(6).

Bolick v. American Barmag Corp., 306 N.C. 364, 368–69, 293 S.E.2d 415, 419 (1982) (citations omitted). Therefore, "the commencement of the action within the time [the statute] fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right." *Id.* (citation and quotation marks omitted).

Compliance with the "Notice of Complaint" filing requirement was jurisdictional and unwaivable, and non-compliance would have served to prevent the trial court from exercising jurisdiction. *In re T.R.P.*, 360 N.C. 588, 590-91, 636 S.E.2d 787, 790 (2006). Absent subject matter jurisdiction at the trail court level, this Court is without jurisdiction to consider the matter on appeal. *State v. Earley*, 24 N.C. App. 387, 389, 210 S.E.2d 541, 543 (1975) ("[T]he jurisdiction of the appellate courts on an appeal is derivative. If the trial court has no jurisdiction, the appellate courts cannot acquire jurisdiction by appeal.").

The majority opinion relies on the allegations in Plaintiff's Complaint as the sole evidence that the Notice of Complaint was timely filed with the Board. The majority opinion's view is that Plaintiff's allegation in Plaintiff's Complaint that Plaintiff filed the Notice of Complaint on 25 October 2012 was self-proving, and no additional record evidence is required. I disagree with the majority opinion's position that Plaintiff's mere allegation that it had timely filed the Notice of Complaint can suffice to meet Plaintiff's burden of proving jurisdiction. Further, Mr. Forest's signature on the Notice of Complaint was notarized on 26 October 2012. Plaintiff's allegation that the Notice of Complaint was filed on 25 October 2012, a day before it was signed by Mr. Forest, cannot be correct and, therefore, should not be relied on to prove a jurisdictional requirement.

Rule 9 of our Rules of Appellate Procedure requires all record copies of filed documents to include the file stamp so that this Court can verify the date of filing. N.C. R. App. P. 9(b)(3). Failure to include a properly executed and filed *jurisdictionally required* document in the record generally results in dismissal of an appeal. *See Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 563–64, 402 S.E.2d 407, 408 (1991); *McKinney v. Duncan*, __ N.C. App. __, __, 808 S.E.2d 509, 512 (2017) ("The order is devoid of any stamp-file or other marking necessary to indicate a filing date, and therefore it was not entered. *See Huebner v. Triangle Research Collaborative*, 193 N.C. App. 420, 422, 667 S.E.2d 309, 310 (2008) (asserting that a filing date is to be determined by the date indicated on the file-stamp); *see also Watson*, 211 N.C. App. at 373, 712 S.E.2d at 157 (standing for the proposition that a signed and dated order

is insufficient to be considered filed.");[5] *State v. High*, 230 N.C. App. 330, 335–37, 750 S.E.2d 9, 13–14 (2013); *State v. Moore*, 148 N.C. App. 568, 571, 559 S.E.2d 565, 567 (2001). I agree with the majority opinion that including a file-stamped copy of the Notice of Complaint was not the only manner in which Plaintiff could have proven the Notice of Complaint was timely filed. For instance, an affidavit from the Board averring timely filing would likely have served as an adequate substitute. However, I cannot find any law of this State advocating that Plaintiff's own allegations can serve to meet Plaintiff's burden to demonstrate that the trial court had jurisdiction, and I do not believe that is the law of this State.

Absent evidence of compliance with the N.C.G.S. § 163-278.39A(f)(1) Notice of Complaint filing requirement, the record fails to establish that the trial court obtained subject matter jurisdiction. S*ee Hargett v. Holland*, 337 N.C. 651, 654–55, 447 S.E.2d 784, 787 (1994) (citations and quotation marks omitted) ("A statute of repose creates an additional element of the claim itself which must be satisfied in order for the claim to be maintained."). Absent proof of jurisdiction at the trial court level, this Court is without jurisdiction to consider Plaintiff's appeal. *Earley*, 24 N.C. App. at 389, 210 S.E.2d at 543. I would also dismiss Plaintiff's appeal for this reason.

III. Conclusion

This appeal should be dismissed for lack of subject matter jurisdiction. First, I believe it is ultimately our Supreme Court that determines what elements are constitutionally required in order to confer standing and, in the present case, our constitution requires more than a bare allegation of a statutory violation. Plaintiff did not allege any injury to itself resulting from the alleged violations of N.C.G.S. § 163-278.39A, and I would hold that Plaintiff lacked standing to bring this action. Second, by failing to include a file-stamped copy of the Notice of Complaint, or other sufficient evidence that the Notice of Complaint was timely filed, Plaintiff has failed in its burden of proving it complied with a jurisdictional condition precedent to the filing of this action.

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5. I also disagree with the majority opinion's statement that "the lack of a file stamp does not bear on our *appellate* jurisdiction" and, therefore, these opinions are "inapposite." If, as I believe based on the evidence in this case, the absence of a file-stamped copy of the Notice of Complaint in the record deprived the trial court of jurisdiction, it necessarily deprives this Court of jurisdiction as well, as our jurisdiction is derivative. *Shepard v. Leonard*, 223 N.C. 110, 112, 25 S.E.2d 445, 447 (1943) ("Our jurisdiction is derivative. If the Superior Court judge who signed the order was without jurisdiction we have none and it has been the consistent policy of this Court, in the absence of motion, to dismiss *ex mero motu* so soon as a defect in jurisdiction is made to appear.").

SERAFINO "VINCE" CORDARO, Plaintiff
v.
HARRINGTON BANK, FSB, n/k/a BANK OF NORTH CAROLINA, a North Carolina Bank, Defendant, and BANK OF NORTH CAROLINA, Third-Party Plaintiff,
v.
DANNY D. GOODWIN D/B/A DANNY GOODWIN APPRAISALS, Third-Party Defendant

No. COA17-1032

Filed 19 June 2018

1. Negligence—construction loan—bank appraisal—justifiable reliance by borrower

A borrower failed to properly plead the element of justifiable reliance in his claims for negligence and negligent misrepresentation against a lender by not including allegations that he undertook his own independent inquiry about the validity of the lender's appraisal prior to taking out a residential construction loan or that he was prevented from doing so.

2. Contracts—construction loan—duty of care

A residential construction loan agreement provision stating that an appraisal must account for applicable regulatory requirements did not create a duty of care for the lender to ensure the accuracy of the appraisal or its compliance with government standards where the appraisal was for the sole benefit of the lender, rendering the borrower's claims for breach of contract and breach of implied covenant of good faith and fair dealing subject to dismissal.

3. Unfair Trade Practices—misrepresentation—reliance—sufficiency of pleadings

A borrower asserting a claim for unfair and deceptive trade practices against a lender failed to sufficiently allege that he reasonably relied on the appraisal obtained by the lender before entering into an agreement for a residential construction loan.

Appeal by plaintiff from order entered 8 August 2017 by Judge Lindsay R. Davis, Jr. in Chatham County Superior Court. Heard in the Court of Appeals 7 March 2018.

Sigmon Law, PLLC, by Mark R. Sigmon, for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P, by S. Wilson Quick and Reid L. Phillips for defendant-appellee.

DAVIS, Judge.

In this appeal, we consider the potential liability of a bank for providing an inaccurate appraisal value to its borrower in connection with a residential loan. Serafino "Vince" Cordaro filed this civil action asserting claims against Harrington Bank[1] ("Harrington") premised upon theories of negligence, negligent misrepresentation, breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1. Because we conclude that Cordaro's complaint failed to sufficiently plead justifiable reliance upon the appraisal information at issue or the existence of a contractual duty owed to him by Harrington with regard to the appraisal, we hold that the trial court properly granted Harrington's motion to dismiss.

Factual and Procedural Background

We have summarized the pertinent facts below using Plaintiff's own statements from his complaint, which we treat as true in reviewing a trial court's order granting a motion to dismiss. *See*, *e.g.*, *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006) ("When reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true." (citation omitted)).

In 2011, Cordaro purchased a lot in the Governor's Club subdivision of Chapel Hill where he intended to build a home. Cordaro paid $294,500 for the lot. He hired an architect in May 2012 to design the planned residence. His contract with the architect provided that the completed house would consist of approximately 3,000 square feet and cost approximately $800,000 to build.

I. Loan Application and Construction Appraisal

In November 2012, Cordaro began looking for a lender to provide him with a construction loan that could later be converted into a mortgage once the home was built. He visited Harrington's website and began filling out a loan application online. Prior to completing the application, Cordaro called John MacDonald, a loan officer employed by Harrington, to discuss the potential loan. During this conversation, Cordaro informed MacDonald that if the value contained in Harrington's internal appraisal of the planned home was less than the price he paid

1. At some point during the time period relevant to this litigation, Harrington Bank was acquired by Bank of North Carolina.

for the lot plus the cost of construction then he would not go forward with either the loan or the construction of the house.

Following his discussion with MacDonald, Cordaro signed a construction contract with Brightleaf Development Company ("Brightleaf") on 28 November 2012. The contract listed the total cost to build the house as $835,359. Cordaro and Brightleaf also verbally agreed that if the house was not appraised at a value equal to the cost of the lot plus the cost of construction then the home would not be built and the contract would be void.

On 4 December 2012, Cordaro submitted a loan application to Harrington seeking a loan of $850,000. In connection with the loan application, MacDonald ordered an appraisal through Community Bank Real Estate Solutions ("CBRES"), an appraisal management company. Along with his request, MacDonald submitted to CBRES Cordaro's construction contract, construction drawings, and the lot's purchase price. An appraiser named Danny Goodwin was assigned by CBRES to appraise Cordaro's prospective residence. On 10 December 2012, Goodwin appraised the home at a value of $1,150,000.

MacDonald emailed Goodwin's appraisal (the "Construction Appraisal") to Cordaro on 12 December 2012. An hour after receiving the Construction Appraisal, Cordaro sent an email to his architect informing him of the appraisal amount and asking him to tell Brightleaf that construction could begin on the home.

On 19 December 2012, MacDonald emailed Cordaro once again, informing him that Harrington's loan committee had approved his loan on the condition that Cordaro put $100,000 in escrow as a cash reserve. Cordaro responded later that day, asking why he was being asked to provide a cash reserve and inquiring whether this requirement was a standard practice of Harrington's. MacDonald replied that the loan committee was concerned about the proposed residence's high cost per square foot. Cordaro then asked MacDonald if he should be concerned about the value of the house. MacDonald responded that there was no reason for concern and told Cordaro that the committee was simply being "overly cautious." Cordaro refused to place $100,000 in escrow but instead offered to put down $58,000 in cash. Harrington accepted this proposal.

Harrington proceeded to conduct an internal review of the Construction Appraisal. On 21 December 2012, MacDonald signed an appraisal review form stating his belief that the Construction Appraisal

was a reasonable estimate of the value of Cordaro's home and that it complied with applicable regulatory requirements. The review form was also signed by a second employee of Harrington on 24 December 2013. Both reviews were required under Harrington's Consumer & Mortgage Loan Policy & Product Manual, which provided that every appraisal received by Harrington "shall be reviewed for conformity with minimum regulatory requirements" and that appraisals "with transactions in excess of $500,000 will receive a secondary review by the Manager of Mortgage Lending."

II. Construction Loan Agreement

On 29 January 2013, Cordaro submitted a second loan application that was identical in all respects to the first application except that it provided for a decreased loan amount of $777,250. The following day, Cordaro signed a contract (the "Construction Loan Agreement") with Harrington. This agreement contained language stating as follows:

> Appraisal. If required by Lender, an appraisal shall be prepared for the Property, at Borrower's expense, which in form and substance shall be satisfactory to Lender, in Lender's sole discretion, including applicable regulatory requirements.

Construction began on the house in early 2013. The total acquisition and construction cost of the property was ultimately $1,250,000.

III. Mortgage Appraisal

As construction neared completion in late 2013, Cordaro began working with MacDonald to refinance his construction loan and receive a permanent mortgage loan from Harrington. Unbeknownst to Cordaro, Harrington planned to provide him with a mortgage loan and then immediately sell the mortgage to Amerisave Mortgage Company ("Amerisave").

In January 2014, Harrington ordered a new appraisal of Cordaro's home for purposes of the mortgage loan. An individual named Luther Misenheimer was assigned to conduct the new appraisal. On 28 January 2014, MacDonald emailed Misenheimer a copy of Goodwin's earlier Construction Appraisal, informing Misenheimer that he should "[c]all if you need additional info." Several hours later, MacDonald emailed Misenheimer again and stated that "[w]e need a BIG number . . . . . ☺."

Misenheimer ultimately declined to perform the appraisal for Harrington. The appraisal was then reassigned to Goodwin. Goodwin issued his second appraisal (the "Mortgage Appraisal") on 10 February 2014, valuing the property at $1,250,000.

Upon receiving Goodwin's Mortgage Appraisal, Harrington requested that CBRES run the Mortgage Appraisal through the Uniform Collateral Data Portal ("UCDP"), a system that performs independent automated risk assessments of submitted appraisals. CBRES submitted the Mortgage Appraisal to the UCDP on 11 February 2014, and the system flagged ten separate flaws with the appraisal. Among the flaws noted were the fact that (1) Goodwin's valuation of Cordaro's home was "significantly different" than the sale price of a comparable property used by Goodwin in arriving at his valuation; and (2) the three comparable properties utilized by Goodwin in conducting his appraisal were not similarly situated to Cordaro's home.

Also in February 2014, Amerisave commissioned an outside company called Clear Capital to perform a Collateral Desktop Analysis ("CDA") of the Mortgage Appraisal, which was conducted on 18 February 2014. The CDA valued Cordaro's home at $625,000 — exactly one-half the amount of the Mortgage Appraisal. The CDA also highlighted many of the same flaws with the Mortgage Appraisal that were noted by the UCDP.

On 18 February 2014, an Amerisave employee emailed MacDonald to inform him that Amerisave would not buy the loan from Harrington due to the results of the CDA. MacDonald emailed a coworker on 26 February 2014, stating that "I think [Cordaro's] loan is dead but I'm going to restart with another lender tomorrow." The other lender that MacDonald was referring to in his email was Sierra Pacific Mortgage Company ("Sierra Pacific").

In late February or early March 2014, Cordaro became aware that Harrington intended to sell his mortgage loan to another lender such that third-party approval would be required in order to fund his loan. Nevertheless, Cordaro applied for a new loan from Harrington in the proposed amount of $783,000 on 27 February 2014.

Sierra Pacific hired an appraiser named Jan Faulkner to conduct an appraisal of Cordaro's home. On 10 March 2014, Faulkner valued the property at $800,000. Following Faulkner's appraisal, MacDonald emailed Cordaro new proposed financing terms that consisted of a $600,000 mortgage loan and a $120,000 equity loan. On 21 March 2014, MacDonald emailed Cordaro the results of the CDA that had been commissioned by Amerisave. In the email, MacDonald stated that "[w]e think this appraisal is poor. We fought it and lost."

In mid-April 2014, Harrington informed Cordaro that it could not offer him the permanent mortgage loan of $783,000 for which he had applied and could instead only loan him approximately $600,000. In the

meantime, the balloon payment on Cordaro's construction loan was due at the end of the month. Cordaro took out a $600,000 loan from Sierra Pacific and covered the shortfall between the mortgage loan and the amount due on the construction loan balloon payment by selling off several of his personal investments. On 18 April 2016, an appraiser commissioned by Cordaro valued his property at $765,000.

IV. Lawsuit

On 18 October 2016, Cordaro filed a complaint against Harrington in Chatham County Superior Court alleging claims for negligence, negligent misrepresentation, breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair and deceptive trade practices. Harrington filed an answer along with a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on 26 December 2016. Harrington also filed a third-party complaint against Goodwin on 10 February 2017 in which it asserted claims for breach of contract, negligent misrepresentation, indemnity, and contribution.

On 8 August 2017, the Honorable Lindsay R. Davis, Jr. entered an order granting Harrington's motion to dismiss Cordaro's complaint and also dismissing Harrington's third-party complaint against Goodwin as moot. Cordaro filed a timely notice of appeal to this Court.

Analysis

Cordaro's sole argument on appeal is that the trial court erred by granting Harrington's motion to dismiss. He contends that he has alleged viable claims for relief based on Harrington's actions in obtaining an appraisal that it should have known contained an inflated valuation of his home. He further asserts that Harrington was aware of the fact that he was relying upon the result of the appraisal in deciding whether to go forward with the construction of the home and to take out the accompanying loans. Finally, he contends that MacDonald had a conflict of interest in that he was entitled to receive a commission if the loan was completed yet Harrington nevertheless improperly allowed him to participate in the bank's internal review of the Construction Appraisal.[2]

> The standard of review of an order granting a Rule 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations

2. Cordaro alleges that MacDonald ultimately received a commission of $5,829 in connection with Harrington's loan to Cordaro.

> included therein are taken as true. On appeal, we review the pleadings *de novo* to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Feltman v. City of Wilson, 238 N.C. App. 246, 251, 767 S.E.2d 615, 619 (2014). "Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663 (2013) (citation omitted).

I. Negligence-Based Claims

A. Negligence

[1] We first consider Cordaro's argument that he successfully stated a claim for negligence. He asserts that Harrington owed him a duty of care arising under either the North Carolina Secure and Fair Enforcement Mortgage Licensing Act[3] (the "SAFE Act") or general common law principles of negligence and that Harrington breached this duty by failing to properly discover and inform him that the appraisal amount was inflated. Cordaro further contends that he "justifiably relied on both the Construction Appraisal and [Harrington's] review and approval of that appraisal, including after [Harrington] asked him to put more money down."

The essential elements of any negligence claim are "the existence of a legal duty or standard of care owed to the plaintiff by the defendant, breach of that duty, and a causal relationship between the breach of duty and certain actual injury or loss sustained by the plaintiff." *Harris v. Daimler Chrysler Corp.*, 180 N.C. App. 551, 555, 638 S.E.2d 260, 265 (2006) (citation and quotation marks omitted). "[T]he first prerequisite for recovery of damages for injury by negligence is the existence of a legal duty, owed by the defendant to the plaintiff, to use due care. If no duty exists, there logically can be neither breach of duty nor liability." *Id.* (internal citation and quotation marks omitted). Furthermore, "[e]ven if a plaintiff can show circumstances giving rise to a duty . . . , absent a sufficient allegation and showing of justifiable reliance, a plaintiff's negligence claims fail." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 449, 781 S.E.2d 1, 8 (2015) (citation omitted).

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3. *See* N.C. Gen. Stat. § 53-244.010, *et seq.* (2017).

As an initial matter, we note that this case does not involve the existence of a fiduciary duty between Cordaro and Harrington. "A fiduciary duty generally arises when one reposes a special confidence in another, and the other in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Id.* (citation and quotation marks omitted). Our Supreme Court has made clear that "[o]rdinary borrower-lender transactions . . . are considered arm's length and do not typically give rise to fiduciary duties." *Dallaire v. Bank of Am., N. A.*, 367 N.C. 363, 368, 760 S.E.2d 263, 266 (2014) (citation omitted). Moreover, "the law does not typically impose upon lenders a duty to put borrowers' interests ahead of their own." *Id.* at 368, 760 S.E.2d at 267.

Instead, Cordaro argues that a legal duty existed through the General Assembly's enactment of the SAFE Act. In addition to regulating the licensure status of mortgage lenders, the SAFE Act also imposes certain duties upon them and prohibits them from taking various specified actions in connection with mortgage loans. The Act contains prefatory language stating that its primary purpose "is to protect consumers seeking mortgage loans and to ensure that the mortgage lending industry operates without unfair, deceptive, and fraudulent practices on the part of mortgage loan originators." N.C. Gen. Stat. § 53-244.020 (2017). Cordaro contends that Harrington violated subsections (1), (8), (11), and (14) of N.C. Gen. Stat. § 53-244.111 — one of the statutes that comprise the SAFE Act. Those subsections provide, in pertinent part, as follows:

> [I]t shall be unlawful for any person in the course of any residential mortgage loan transaction:
>
> (1) To misrepresent or conceal the material facts or make false promises likely to influence, persuade, or induce an applicant for a mortgage loan or a mortgagor to take a mortgage loan, or to pursue a course of misrepresentation through agents or otherwise.
>
> . . . .
>
> (8) To engage in any transaction, practice, or course of business that is not in good faith or fair dealing or that constitutes a fraud upon any person in connection with the brokering or making or servicing of, or purchase or sale of, any mortgage loan.

. . . .

(11) To improperly influence or attempt to improperly influence the development, reporting, result, or review of a real estate appraisal sought in connection with a mortgage loan. . . .

. . . .

(14) To fail to comply with applicable State and federal laws and regulations related to mortgage lending or mortgage servicing.

N.C. Gen. Stat. § 53-244.111 (2017).

This Court ruled in *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 681 S.E.2d 465 (2009), that North Carolina's Mortgage Lending Act[4] — the predecessor statute to the SAFE Act — could serve as the source of a legal duty owed by a lender to a borrower for purposes of a negligence claim. *Id.* at 44, 681 S.E.2d at 476. In that case, the borrowers asserted claims for fraud, negligent misrepresentation, and unfair and deceptive trade practices against their mortgage lender for failing to disclose that their home was located in a flood hazard area. We reversed the trial court's dismissal of the borrowers' claims, stating that "a legal duty of the type claimed by Plaintiffs does exist under the North Carolina Mortgage Lending Act." *Id.* at 36, 681 S.E.2d at 471.

In reaching this conclusion, we examined various provisions of the Act that prohibited certain actions by lenders in connection with mortgage loans. Based on the similarities between the Mortgage Lending Act and the SAFE Act, Cordaro argues that our holding in *Guyton* recognizing the existence of a legal duty under the Mortgage Lending Act applies equally to the SAFE Act.

Even assuming — without deciding — that the SAFE Act can serve as the source of a legal duty owed by a lender to a borrower in the residential loan context, Cordaro is still required to have properly alleged justifiable reliance upon Harrington's actions in order to prevail on his negligence claim. Cordaro contends that his complaint adequately alleged that he justifiably relied upon "both the Construction Appraisal and [Harrington's] review and approval of that appraisal" in signing the Construction Loan Agreement on 30 January 2013. We disagree.

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4. *See* N.C. Gen. Stat. § 53-243.01, *et seq.*, *repealed by* 2009 N.C. Sess. Laws 374, sec. 1 (effective 31 July 2009).

In determining whether Cordaro sufficiently pled justifiable reliance, we find instructive two cases from our appellate courts. *Arnesen* involved nineteen individual investors who decided to invest in undeveloped real estate based upon allegedly faulty appraisal information provided by a bank. *Arnesen*, 368 N.C. at 441, 781 S.E.2d at 3. The investors brought an action against both the bank and its appraisers in which they asserted, *inter alia*, claims for negligence, negligent misrepresentation, fraud, and unfair and deceptive trade practices. *Id.* at 445, 781 S.E.2d at 6. In their complaint, the plaintiffs alleged that "they would not have purchased [the] real property but for [the] faulty appraisal information and that, in any event, the bank should have discovered and disclosed the inflated appraised property values to them." *Id.* at 441, 781 S.E.2d at 3. However, the plaintiffs did not allege that they had reviewed or inquired about the appraisal information prior to making the decision to purchase or that their decision to buy the property was contingent upon the flawed appraisals. *Id.*

Our Supreme Court held that the bank was entitled to dismissal of all claims due to the plaintiffs' failure to sufficiently allege justifiable reliance. The Court explained that "[r]eliance is not reasonable if a plaintiff fails to make any independent investigation, or fails to demonstrate he was prevented from doing so[.]" *Id.* at 449, 781 S.E.2d at 8 (internal citations and quotation marks omitted). Rather, "to establish justifiable reliance a plaintiff must sufficiently allege that he made a reasonable inquiry into the misrepresentation and allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence." *Id.* at 454, 781 S.E.2d at 11 (citation, quotation marks, brackets, and ellipsis omitted). Consequently, the Supreme Court concluded as follows:

> It is undisputed . . . that plaintiffs decided to purchase the investment properties without consulting an appraisal. Moreover, . . . [p]laintiffs have not alleged that they ordered, viewed, or requested appraisal information at any time, or that they were prevented from doing so.

Id. at 448, 781 S.E.2d at 7.

In *Fazarri v. Infinity Partners, LLC*, 235 N.C. App. 233, 762 S.E.2d 237 (2014), a group of real estate investors brought claims for negligence and negligent misrepresentation against their lenders. *Id.* at 235, 762 S.E.2d at 239. The plaintiffs purchased individual lots as part of a real estate development plan that were all identically appraised at $500,000 — regardless of the lot's specific characteristics or location.

The plaintiffs alleged that, in actuality, the true value of the lots "ranged from $40,000-$81,000." *Id.* at 235, 762 S.E.2d at 238. This Court upheld the trial court's grant of summary judgment for the lenders on the ground that the plaintiffs "forecast no evidence that they undertook their own independent inquiries into the value of the lots (such as obtaining their own independent appraisals) or were prevented from doing so." *Id.* at 241, 762 S.E.2d at 242. Therefore, we concluded that the plaintiffs could not demonstrate justifiable reliance. *Id.*

While we are mindful of the fact that we must accept all of Cordaro's allegations as true for purposes of this appeal from the trial court's Rule 12(b)(6) order, his allegations fail to satisfy the requirement of justifiable reliance.[5] Prior to completing a loan application with Harrington, Cordaro had already purchased a lot in the Governor's Club subdivision, hired an architect, and signed a construction contract with a builder. Within an hour of receiving the Construction Appraisal from MacDonald, Cordaro took steps to inform his builder that construction could begin on the house. Furthermore, he made no additional inquiries to anyone other than MacDonald to confirm the accuracy of Goodwin's Construction Appraisal prior to signing the Construction Loan Agreement on 30 January 2013. In short, the allegations in his complaint fail to show that he either engaged in any type of independent inquiry as to the validity of the appraisal value or that he was in any way prevented from doing so.

Cordaro contends that the present case is distinguishable from *Arnesen* and *Fazarri* because he — unlike the plaintiffs in those cases — has alleged that he actually did rely upon the Construction Appraisal in entering into the Construction Loan Agreement. It is true that the *Arnesen* and *Fazarri* plaintiffs did not allege their decisions to purchase the properties at issue in those cases were contingent upon their review of their lenders' appraisals. Nevertheless, both cases make clear that in order to demonstrate justifiable reliance Cordaro was required to allege either that he undertook his own independent inquiry regarding the validity of the Construction Appraisal or that he was somehow prevented from doing so. For this reason, we hold that the trial court did not err in dismissing his negligence claim.[6]

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5. We note that *Arnesen* — like the present case — involved an appeal from a trial court's dismissal of a complaint under Rule 12(b)(6).

6. In light of our ruling that Cordaro has failed to plead facts supporting the existence of justifiable reliance, we need not address Cordaro's alternative argument that Harrington breached a duty it owed to him under common law principles of negligence.

B. Negligent Misrepresentation

It is well established that "the tort of negligent misrepresentation occurs when (1) a party justifiably relies, (2) to his detriment, (3) on information prepared without reasonable care, (4) by one who owed the relying party a duty of care." *Walker v. Town of Stoneville*, 211 N.C. App. 24, 30, 712 S.E.2d 239, 244 (2011) (citations, quotation marks, and brackets omitted). Having already determined that the allegations in Cordaro's complaint failed to demonstrate justifiable reliance, we likewise hold that this same defect bars his negligent misrepresentation claim.

C. Negligent Supervision

In his appellate brief, Cordaro further contends that the trial court erred in dismissing his claim against Harrington for negligent supervision of MacDonald. However, Cordaro did not assert such a claim in his complaint. Although North Carolina recognizes the doctrine of notice pleading, *see Haynie v. Cobb*, 207 N.C. App. 143, 148-49, 698 S.E.2d 194, 198 (2010), a plaintiff is still required to expressly allege in his complaint the specific claims for relief that it is asserting against the defendant. *See Curl v. Am. Multimedia, Inc.*, 187 N.C. App. 649, 656, 654 S.E.2d 76, 81 (2007) ("[N]one of the three causes of action proposed by Plaintiffs were asserted in their complaint. . . . This Court has long held that issues and theories of a case not raised below will not be considered on appeal." (citations, quotation marks, and brackets omitted)). Accordingly, we do not consider Cordaro's arguments as to negligent supervision.

II. Contract-Based Claims

A. Breach of Contract

[2] In addition to asserting claims grounded in negligence, Cordaro's complaint also contains two contract-based claims. Primarily, Cordaro contends that Harrington "breached the Construction Loan Agreement in failing to ensure that the Construction Appraisal complied with [the Uniform Standards of Professional Appraisal Practice] and various other state and federal appraisal requirements."

The elements of a claim for breach of contract are "(1) existence of a valid contract and (2) breach of the terms of that contract." *Johnson v. Colonial Life & Accident Ins. Co.*, 173 N.C. App. 365, 369, 618 S.E.2d 867, 870 (2005) (citation and quotation marks omitted). "[W]here the complaint alleges each of these elements, it is error to dismiss a breach of contract claim under Rule 12(b)(6)." *Woolard v. Davenport*, 166 N.C. App. 129, 134, 601 S.E.2d 319, 322 (2004) (citation omitted).

Cordaro's breach of contract claim is based upon the following provision contained in the Construction Loan Agreement:

> Appraisal. If required by Lender, an appraisal shall be prepared for the Property, at Borrower's expense, which in form and substance shall be satisfactory to Lender, in Lender's sole discretion, including applicable regulatory requirements.

Harrington asserts that this language did not create any contractual duty on its part toward Cordaro. We agree.

By the plain terms of this provision of the Construction Loan Agreement, the preparation of any appraisal was for the sole benefit of Harrington. Moreover, the contractual language further provided that any appraisal prepared "shall be satisfactory to Lender, in Lender's sole discretion[.]" This language reinforces the notion that Harrington was under no contractual obligation to Cordaro to ensure the accuracy of the Construction Appraisal. Rather, any appraisal commissioned by Harrington was entirely for its own internal use.[7]

For these reasons, we conclude that Cordaro's breach of contract claim fails as a matter of law. Therefore, it was properly dismissed by the trial court.

B. Breach of Implied Covenant of Good Faith and Fair Dealing

The invalidity of Cordaro's breach of contract claim on these facts is likewise fatal to his claim for breach of the implied covenant of good faith and fair dealing. Under North Carolina law, every contract contains "an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." *Bicycle Transit Auth. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (citation and quotation marks omitted). *See Maglione v. Aegis Family Health Ctrs.*, 168 N.C. App. 49, 56, 607 S.E.2d 286, 291 (2005) ("In addition to its express terms, a contract contains all terms that are necessarily implied to effect the intention of the parties and which are not in conflict with the express terms." (citation and quotation marks omitted)).

As a general proposition, where a party's claim for breach of the implied covenant of good faith and fair dealing is based upon the same

7. Cordaro contends that the phrase "including applicable regulatory requirements" supports his argument on this issue. However, while the precise meaning of this phrase in the context of this contractual provision is unclear, its inclusion does not alter the fact that the document is devoid of language conferring upon Harrington any contractual obligation to Cordaro with respect to appraisals required by the bank.

acts as its claim for breach of contract, we treat the former claim as "part and parcel" of the latter. *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 19, 472 S.E.2d 358, 368 (1996), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 172-73 (1997); *see Suntrust Bank v. Bryant/Sutphin Props., LLC*, 222 N.C. App. 821, 833, 732 S.E.2d 594, 603 ("As the jury determined that plaintiff did not breach any of its contracts with defendants, it would be illogical for this Court to conclude that plaintiff somehow breached implied terms of the same contracts."), *disc. review denied*, 366 N.C. 417, 735 S.E.2d 180 (2012).

Here, the basis for Cordaro's claim that Harrington breached the implied covenant of good faith and fair dealing is identical to the basis for his breach of contract claim. Therefore, the trial court properly dismissed this claim as well.

III. Unfair and Deceptive Trade Practices Claim

[3] Finally, Cordaro argues that the trial court erred in granting Harrington's motion to dismiss his unfair and deceptive trade practices claim pursuant to Chapter 75 of the North Carolina General Statutes. Once again, we disagree.

N.C. Gen. Stat. § 75-1.1 provides, in relevant part, that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1(a) (2017). It is well established that "[a] claim of unfair and deceptive trade practices under section 75-1.1 of the North Carolina General Statutes requires proof of three elements: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, which (3) proximately caused actual injury to the claimant." *Nucor Corp. v. Prudential Equity Grp., LLC*, 189 N.C. App. 731, 738, 659 S.E.2d 483, 488 (2008) (citation omitted). Our Supreme Court has held that "a claim under section 75-1.1 stemming from an alleged misrepresentation . . . require[s] a plaintiff to demonstrate reliance on the misrepresentation in order to show the necessary proximate cause." *Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81, 88, 747 S.E.2d 220, 226 (2013).

> We previously likened such burden of proof to that of the detrimental reliance requirement under a fraud claim. In making this inquiry we examine the mental state of the plaintiff. Two key elements specific to the plaintiff combine to determine detrimental reliance: (1) actual reliance and (2) reasonable reliance.

Id. at 89, 747 S.E.2d at 227 (internal citation and quotation marks omitted).

As discussed above, Cordaro has failed to sufficiently allege that he reasonably relied on the Construction Appraisal. Therefore, he cannot satisfy the elements of a claim under N.C. Gen. Stat. § 75-1.1. Accordingly, the trial court did not err in dismissing this claim.

Conclusion

For the reasons stated above, we affirm the trial court's 8 August 2017 order.

AFFIRMED.

Judges STROUD and BERGER concur.

JEFFREY HUNT, Petitioner
v.
N.C. DEPARTMENT OF PUBLIC SAFETY, Respondent

No. COA17-1244

Filed 19 June 2018

1. Administrative Law—dismissed State employee—Office of Administrative Hearings—subject matter jurisdiction

Where a state agency refused to allow an employee to return to work on the ground that he had resigned from his employment, refused to consider his grievance denying the alleged resignation, and moved to dismiss his petition for a contested case in the Office of Administrative Hearings (OAH) based on lack of subject matter jurisdiction due to his failure to exhaust the internal agency grievance process and timely file his grievance, the Court of Appeals rejected the agency's argument that OAH lacked subject matter jurisdiction over the appeal. Even assuming the employee said "I quit" to his unit manager, she had no authority to accept his resignation, so his separation from employment was an involuntary discharge rather than a voluntary resignation. The agency failed to comply with its statutory duty to send a statement of appeal rights to the employee following his involuntary discharge, so the deadline for filing a grievance was not triggered. He filed his OAH petition within 30 days of the agency's letter stating its refusal to consider his grievance.

2. Public Officers and Employees—discharge—just cause—resignation

An administrative law judge properly determined that a correction officer's discharge was not in accord with North Carolina law where the agency's argument consistently hinged on the notion that the employee voluntarily resigned and that proposition was rejected by the Court of Appeals. The agency did not argue that it had just cause to terminate the employee's employment.

3. Attorney Fees—administrative hearing—award—separate order

An administrative law judge (ALJ) did not err by awarding attorney fees to a dismissed State employee. The agency did not cite any legal authority specifically prohibiting the award of attorney fees in a separate order, nor did the agency show that it was prejudiced by the ALJ's failure to allow the agency ten days to reply to the petition for attorney fees.

Appeal by respondent from orders entered 5 April 2017, 17 August 2017, and 28 August 2017 by Administrative Law Judge Melissa Owens Lassiter in the Office of Administrative Hearings. Heard in the Court of Appeals 16 May 2018.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for petitioner-appellee.

Attorney General Joshua H. Stein, by Assistant Attorney General Tamika L. Henderson, for respondent-appellant.

DAVIS, Judge.

In this case, a state agency refused to allow an employee to return to work on the ground that he had resigned from his employment. When the employee attempted to file a grievance in which he denied that he had, in fact, resigned, the agency refused to consider the grievance, and the employee filed a petition for a contested case hearing in the North Carolina Office of Administrative Hearings ("OAH"). An administrative law judge ruled in favor of the employee and ordered that he be reinstated to his former position. Because we hold that no legally effective resignation occurred and the agency lacked just cause to terminate his employment, we affirm.

Factual and Procedural Background

In November 2016, Jeffrey Hunt was a career status state employee who worked for the North Carolina Department of Public Safety ("DPS") as a correctional officer at Scotland Correctional Institution. During the summer of 2016, Hunt received two warnings about his tardiness and absenteeism.

On 2 November 2016, Hunt's unit manager, Queen Gerald, asked him to report to the prison before his shift began the following day. At 5:27 p.m. on 3 November 2016, Hunt entered the facility and met with Gerald in an administration area room. Gerald informed him that she was investigating his alleged absence from work on 18 August 2016 and asked him to sign paperwork regarding the absence. Hunt informed Gerald that he would not sign documents regarding an absence for which he had no recollection. He became upset and walked out of the prison through the main door.

Gerald later testified that she heard Hunt say either "I quit" or "I'm quitting" as he walked away. Hunt denied making such a statement. An individual in the vicinity recalled hearing Hunt state: "I'm tired of this s[***]."

Hunt left the prison without "swiping out," and Gerald informed the officer-in-charge that Hunt had resigned. Several minutes later, Hunt tried to re-enter the prison to begin working his shift but was denied entry by the officer-in-charge.

On 4 November 2016, Hunt attempted to contact Superintendent Katy Poole by telephone to discuss his job status but learned that she was on vacation. Poole returned to the office on 7 November 2016, and an assistant superintendent informed her that Hunt had verbally resigned to Gerald.

On 9 November 2016, Poole spoke with Hunt by telephone. Hunt inquired whether "he could return to work." Poole asked him if he was rescinding his resignation to which Hunt responded: "Yes." Poole informed him that she had already accepted his verbal resignation and that she was unwilling to rescind it based on "his history of pending investigations and corrective actions" as well as his behavior toward Gerald during the 3 November 2016 incident.

That same day, Hunt received a letter from DPS confirming that he had resigned on 3 November 2016. The letter did not contain any information about his ability to appeal the separation of his employment. On 21 November 2016, DPS received a letter from Hunt in which he stated

that "at no time during my conversation with Mrs. Gerald (Unit Manager) on 11/3/2016 did I give a resignation."

On 20 January 2017, Hunt submitted a Step 1 grievance letter to DPS's Grievance Intake Office. DPS notified Hunt by letter on 14 February 2017 that his internal grievance could not be processed by the agency because he had resigned from his employment.

On 22 February 2017, Hunt filed a petition for a contested case hearing in OAH. DPS moved to dismiss the petition on 24 March 2017 based on lack of subject matter jurisdiction. In its motion, DPS asserted that Hunt had "failed to exhaust the internal agency grievance process" and "failed to file his grievance within fifteen (15) days of the event pursuant to DPS policy."

On 5 April 2017, Administrative Law Judge Melissa Owens Lassiter (the "ALJ") entered an order denying DPS's motion to dismiss. A hearing was held before the ALJ on 15 June 2017.

On 17 August 2017, the ALJ issued a Final Decision pursuant to N.C. Gen. Stat. § 150B-34 in which she determined that Hunt had "never submitted a verbal statement of resignation to any DPS employee authorized to accept it." The ALJ concluded that DPS had, therefore, acted unlawfully by terminating Hunt's employment without just cause. The ALJ ordered that Hunt be reinstated to the same — or a similar — position held by him prior to his separation and that he receive back pay and attorneys' fees.

On 22 August 2017, Hunt filed a petition for attorneys' fees, which the ALJ granted in an order entered 28 August 2017 (the "Attorneys' Fees Order") awarding him $11,720.00 in attorneys' fees and $20.00 in filing fees. DPS filed a timely notice of appeal as to the 5 April 2017 order, the Final Decision, and the Attorneys' Fees Order.

Analysis

On appeal, DPS contends that the ALJ erred by (1) denying its motion to dismiss Hunt's contested case petition for lack of jurisdiction; (2) concluding that the separation of Hunt from his employment resulted from a discharge rather than a voluntary resignation; and (3) awarding attorneys' fees to Hunt. We address each argument in turn.

I. Subject Matter Jurisdiction of OAH

[1] DPS's first argument is that the ALJ improperly denied DPS's motion to dismiss because OAH did not possess subject matter jurisdiction over Hunt's appeal. DPS contends that jurisdiction was lacking because Hunt

failed to properly follow the mandatory grievance procedure required under North Carolina law before filing a contested case petition in OAH. Hunt, conversely, asserts that because DPS refused to consider his grievance the agency made it impossible for him to follow the grievance procedure.

"Our standard of review of a motion to dismiss for lack of [subject matter] jurisdiction . . . is *de novo*." *Brown v. N.C. Dep't of Pub. Safety*, __ N.C. App. __, __, 808 S.E.2d 322, 324 (2017) (citation and quotation marks omitted), *disc. review denied*, __ N.C. __, 811 S.E.2d 589 (2018). "Under *de novo* review, the Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Id.* at __, 808 S.E.2d at 324 (citation and quotation marks omitted).

In order to assess DPS's arguments, it is necessary to review the pertinent statutes that apply to these facts. Prior to 2013, the statutory scheme governing personnel actions against State employees was known as the State Personnel Act. "In 2013, our General Assembly significantly amended and streamlined the procedure governing state employee grievances and contested case hearings, applicable to cases commencing on or after 21 August 2013." *Harris v. N.C. Dep't of Pub. Safety*, __ N.C. App. __, __, 798 S.E.2d 127, 131, *aff'd per curiam*, __ N.C. __, 808 S.E.2d 142 (2017). The revised set of statutes remains codified in Chapter 126 of the North Carolina General Statutes but is now called "the North Carolina Human Resources Act."

N.C. Gen. Stat. § 126-35(a) sets out the procedure by which a career state employee may appeal disciplinary action taken against him and states as follows:

> (a) No career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause. *In cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting forth the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights. The employee shall be permitted 15 days from the date the statement is delivered to appeal to the head of the agency through the agency grievance procedure for a final agency decision.* However, an employee may be suspended without warning for causes relating to personal conduct detrimental to State service, pending the giving of written reasons, in

> order to avoid undue disruption of work or to protect the safety of persons or property or for other serious reasons. If the employee is not satisfied with the final agency decision *or is unable, within a reasonable period of time, to obtain a final agency decision*, the employee may appeal to the Office of Administrative Hearings. Such appeal shall be filed not later than 30 days after receipt of notice of the final agency decision. The State Human Resources Commission may adopt, subject to the approval of the Governor, rules that define just cause.

N.C. Gen. Stat. § 126-35(a) (2017) (emphasis added). "In order for the OAH to have jurisdiction over [a] petitioner's appeal pursuant to N.C. Gen. Stat. §[ ] 126-35 . . . , [the] petitioner is required to follow the statutory requirements outlined in Chapter 126 for commencing a contested case." *Nailing v. UNC-CH*, 117 N.C. App. 318, 324, 451 S.E.2d 351, 355 (1994) (citation omitted), *disc. review denied*, 339 N.C. 614, 454 S.E.2d 255 (1995).

N.C. Gen. Stat. § 126-34.01 establishes a grievance procedure that employees are generally required to follow in situations involving a discharge, suspension, or demotion.

> Any State employee having a grievance arising out of or due to the employee's employment shall first discuss the problem or grievance with the employee's supervisor, unless the problem or grievance is with the supervisor. Then the employee shall follow the grievance procedure approved by the State Human Resources Commission. The proposed agency final decision shall not be issued nor become final until reviewed and approved by the Office of State Human Resources. The agency grievance procedure and Office of State Human Resources review shall be completed within 90 days from the date the grievance is filed.

N.C. Gen. Stat. § 126-34.01 (2017).

"Once a final agency decision is issued, a potential, current, or former State employee may appeal an adverse employment action as a contested case pursuant to the method provided in N.C. Gen. Stat. § 126-34.02 . . . ." *Harris*, __ N.C. App. at __, 798 S.E.2d at 131. N.C. Gen. Stat. § 126-34.02(a) states, in relevant part, as follows:

> (a) Once a final agency decision has been issued in accordance with G.S. 126-34.01, an applicant for

> State employment, a State employee, or former State employee may file a contested case in the Office of Administrative Hearings under Article 3 of Chapter 150B of the General Statutes. The contested case must be filed within 30 days of receipt of the final agency decision. . . . In deciding cases under this section, the Office of Administrative Hearings may grant the following relief:
>
> (1) Reinstate any employee to the position from which the employee has been removed.
>
> (2) Order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied.
>
> (3) Direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improper action of the appointing authority.
>
> An aggrieved party in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal shall be as provided by the rules of appellate procedure. The appeal shall be taken within 30 days of receipt of the written notice of final decision. A notice of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.

N.C. Gen. Stat. § 126-34.02(a) (2017).

This Court recently held that "[w]hile Chapter 126 is silent on the issue, Chapter 150B, the Administrative Procedure Act, specifically governs the scope and standard of this Court's review of an administrative agency's final decision." *Harris*, __ N.C. App. at __, 798 S.E.2d at 132. Chapter 150B of the North Carolina General Statutes states, in pertinent part, the following:

> The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:

> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2017).

Having reviewed the applicable provisions of the Human Resources Act, we must next apply them to the facts of the present case. DPS contends that OAH lacked jurisdiction over this action for two reasons. First, it argues that N.C. Gen. Stat. § 126-35(a) does not apply to Hunt because his employment with DPS ended as a result of his own voluntary resignation rather than from a discharge. Second, it contends that the Step 1 grievance letter submitted by Hunt was untimely in that he was required to submit a grievance within fifteen days of receiving the 9 November 2016 letter confirming his resignation but did not actually do so until 20 January 2017.

Hunt, in turn, asserts that (1) he did not resign and was instead effectively discharged from his employment with DPS; and (2) because he was never provided by DPS with a statement of his appeal rights, the deadline for his filing of a Step 1 grievance was never triggered. Furthermore, he argues, his OAH petition for a contested case hearing was timely because it was filed within thirty days of DPS's l4 February 2017 letter stating its refusal to consider his grievance.

A. Validity of Alleged Resignation

In order to untangle the jurisdictional knot that exists in this case, we must first determine whether Hunt resigned or was discharged. This is so because the nature of the parties' respective obligations under the Human Resources Act hinges on the answer to this question.

Pursuant to 25 N.C.A.C. 1C.1002,

> [a]n employee may terminate his services with the state by submitting a resignation *to the appointing authority*.

25 N.C.A.C. 1C.1002 (2016) (emphasis added).

The pertinent findings of fact made by the ALJ on this issue stated as follows:

> 7. Around 5:27 p.m. on November 3, 2016, [Hunt] reported to work and entered the facility. He and Ms. Gerald met in the lobby of the prison, and then stepped into an administration area room. Ms. Gerald informed [Hunt] that she was investigating [Hunt]'s alleged absence from work on August 18, 2016, and asked [Hunt] to sign a disciplinary form about [Hunt]'s alleged absence from work on that date. [Hunt] advised Ms. Gerald that he did not recall being absent from work on August 18, 2016, and he wasn't going to sign paperwork about an absence for which he had no recollection. [Hunt] became upset, and loud. [Hunt] stated, "I'm tired of this s[***]." [Hunt] made that statement, because he was tired of being accused of wrongdoing, was written up recently . . . , and because he was upset that he was being investigated for an absence from work that occurred three months prior. [Hunt] walked through the main door of the prison towards the gatehouse as night shift staff gathered in the lobby for the night shift line-up.
>
> 8. Per Ms. Gerald's testimony at hearing, [Hunt] said either "I quit," or "I'm quitting," as he walked out the administration area door. . . .
>
> 9. In contrast, [Hunt] consistently denied telling Ms. Gerald that "I quit" on November 3, 2016, in [Hunt]'s November 21, 2016 request for a hearing . . . , his internal appeal . . . , and at the contested case hearing.
>
> 10. On November 3, 2016, [Hunt] walked out of the prison through the gatehouse without swiping out at the security check point. Ms. Gerald advised the Officer-in-Charge, Captain Delgado, that [Hunt] had stated he quit, and walked out of the prison facility.
>
> . . . .
>
> 14. While Ms. Gerald was a unit manager, she was not [Hunt]'s supervisor in any capacity, and did not have the authority to accept a resignation from [Hunt], or have the authority to terminate a correctional officer's employment.
>
> . . . .

17. On November 9, 2016, Superintendent Poole, along with Assistant Superintendent Dean Locklear, telephoned [Hunt], and spoke with [Hunt] via the speaker phone in Ms. Poole's office. Poole advised [Hunt] that Locklear was present and witnessing the call. Poole asked [Hunt] what could she do for him. [Hunt] asked if he could return to work. Poole told [Hunt] that she understood that he had verbally informed Ms. Gerald that he had quit when she questioned him about an internal investigation. [Hunt] asked again if he could return to work. Poole asked [Hunt] if he was requesting her to rescind his resignation, and [Hunt] replied, "Yes." Poole advised [Hunt] that, after reviewing his history of pending investigations and corrective actions, and based on his behavior toward Ms. Gerald when Gerald questioned him about the investigation, she accepted his verbal resignation and would not rescind his resignation. . . .

. . . .

19. On November 10, 2016, Ms. Poole completed a Correctional Officer Separation Information form showing [Hunt]'s effective date of separation as November 4, 2016. She wrote the following as the reason and circumstances surrounding [Hunt]'s separation:

> Verbal Resignation
>
> Spoke with Ofr. Hunt on 11/9/16 accepted his verbal resignation. Ofr. Hunt had several . . . allegations of misconduct that were being investigated.

. . . .

22. There was no evidence presented at hearing that [Hunt] resigned, either verbally or otherwise, to any DPS employee who was authorized to accept a resignation from [Hunt] on November 3, 2016. Ms. Gerald was the only person who testified at hearing that [Hunt] stated he was quitting his job. Ms. Gerald was not [Hunt]'s direct supervisor, did not work with [Hunt], and did not have much direct interaction with [Hunt], as Gerald worked the day shift, and [Hunt] worked the night shift. In direct contrast, [Hunt] denied telling Ms. Gerald, "I quit." [Hunt] attempted to return to the workplace on November 3, 2016 before his shift started, but [DPS] refused to allow him to do so

> per Capt. Delgado's orders. The fact that [Hunt] knew about Capt. Delgado's orders corroborated [Hunt]'s account that he attempted to return to work on November 3, 2016.
>
> 23. At hearing, neither Superintendent Poole nor Asst. Superintendent Locklear testified that [Hunt] said he quit his job during their November 9, 2016 telephone conversation. Instead, [Hunt] informed Poole that he wanted to go back to work.
>
> . . . .
>
> 26. The preponderance of the evidence at hearing proved that [DPS] involuntarily separated [Hunt] from employment on November 3, 2016, as opposed to a voluntary resignation by [Hunt], when Superintendent Poole refused to allow [Hunt] to return to work. Ms. Poole admitted that her "acceptance" of [Hunt]'s "resignation" was based upon [Hunt]'s pending investigation and past corrective actions, and [Hunt]'s behavior toward Ms. Gerald when Gerald questioned him about the investigation. By basing her "acceptance" of [Hunt]'s alleged "resignation" on [Hunt]'s pending investigation and past corrective actions, Ms. Poole's decision to deny [Hunt] to return to work became a disciplinary action against [Hunt]'s employment under NCGS 126-35, without first following the disciplinary procedures required by Chapter 126 of the North Carolina General Statutes. . . .

Based on our review of these findings, it is clear that the ALJ did not resolve the factual dispute arising from the testimony of the witnesses as to whether or not Hunt actually stated to Gerald that he was quitting. It is the duty of an ALJ as the finder of fact in OAH proceedings to resolve material facts that are in dispute. *Harris*, __ N.C. App. at __, 798 S.E.2d at 137 ("As the sole fact-finder, the ALJ has both the duty and prerogative to determine the credibility of the witnesses, the weight and sufficiency of their testimony, to draw inferences from the facts, and to sift and appraise conflicting and circumstantial evidence." (citation and quotation marks omitted)). We agree, however, with the ALJ's implicit determination that a resolution of this issue was not necessary because even taking as true Gerald's testimony that Hunt stated he was quitting, such a statement would not have amounted to a legally effective resignation.

As noted above, 25 N.C.A.C. 1C.1002 requires that resignations be submitted to the "appointing authority." Our appellate courts have not yet had the opportunity to consider the meaning of the term "appointing authority" as it is used in 25 N.C.A.C. 1C.1002. Moreover, neither the North Carolina Administrative Code nor our General Statutes define the term.

In construing this term, we must first look to the plain meaning of these words. *Britt v. N.C. Sheriffs' Educ. & Training Standards Comm'n*, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998) ("When the language of regulations is clear and unambiguous, there is no room for judicial construction, and courts must give the regulations their plain meaning." (citation omitted)). "In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words . . . ." *Perkins v. Ark. Trucking Servs.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000) (citation omitted).

The word "appoint" is defined as "to name or select officially for an office, position, etc." Webster's New World College Dictionary 69 (4th ed. 2010). "Authority" is defined as "persons, esp[ecially] in government, having the power or right to enforce orders, laws, etc." *Id.* at 95. Thus, on these facts, we deem it appropriate to construe the phrase "appointing authority" in 25 N.C.A.C. 1C.1002 as referring to the person or persons who have the power to make personnel decisions at Scotland Correctional Institution.

Such a definition is consistent with the usage of this term in Title 25 of the Administrative Code as referring to persons who initiate personnel actions against State employees. *See*, *e.g.*, 25 N.C.A.C. 1J.0604 (2016) ("Any employee, regardless of occupation, position or profession may be warned, demoted, suspended or dismissed by *the appointing authority*." (emphasis added)).

At the 15 June 2017 hearing, Gerald testified as follows:

> [COUNSEL:] . . . Do you have the authority, that you know of, to independently hire an employee?
>
> [GERALD:] No, I do not.
>
> [COUNSEL:] Do you have the authority, to your knowledge, to independently fire an employee?
>
> [GERALD:] I do not have that authority either.
>
> . . . .

> [COUNSEL:] . . . As a part of this investigation, were you or were you not given the specific authority to accept his resignation?
>
> [GERALD:] No, I was not.

Thus, Gerald's testimony demonstrates that she lacked the authority to make hiring and firing decisions as to employees at the prison. This means that she cannot be deemed to have been the "appointing authority" pursuant to 25 N.C.A.C. 1C.1002, which — in turn — leads to the conclusion that Gerald had no legal authority to accept Hunt's resignation.

Although the parties agree that Poole would qualify as the "appointing authority" based on her position as superintendent at Scotland Correctional Institution, the record is devoid of any indication that Hunt ever informed Poole that he wished to resign. Indeed, to the contrary, the undisputed testimony was that he told her he wished to continue working at the prison during their conversation on 9 November 2016.

Thus, because Gerald had no authority to accept Hunt's resignation, Hunt did not submit a legally effective resignation *even if* Gerald's testimony as to the words he used during their 3 November 2016 encounter is accepted as true. As a result, Hunt's separation from employment constituted an involuntary discharge rather than a voluntary resignation.

B. Compliance With Grievance Process

Having determined that Hunt was discharged by DPS, we must still address whether — as DPS claims — his appeal to OAH was untimely on the ground that his grievance letter was not submitted within fifteen days of the 9 November 2016 letter stating that DPS had accepted his "resignation." In response to this argument, Hunt contends that (1) the fifteen-day deadline for submission of his grievance was never triggered because DPS failed to furnish him with a statement of his appeal rights; and (2) he was not required to complete the grievance procedure because DPS refused to process his grievance.

As stated above, N.C. Gen. Stat. § 126-35(a) requires that "[i]n cases of [discharge], the employee shall, before the action is taken, be furnished with a statement in writing setting forth the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights." N.C. Gen. Stat. § 126-35(a). Here, DPS does not dispute the fact that it never provided Hunt with a statement of his appeal rights. Instead, it sent Hunt a letter stating that his 3 November 2016 resignation had been accepted by DPS. This letter contained no

information regarding his right to appeal that decision. Approximately twelve days later, Hunt responded by letter to Poole in which he denied ever having resigned. Even after receiving this letter that clearly put DPS on notice of Hunt's disagreement with the notion that he had resigned, DPS still did not inform him of his appeal rights.

Thus, DPS failed to comply with its statutory duty under N.C. Gen. Stat. § 126-35(a). *See*, *e.g.*, *Nix v. Dep't of Admin.*, 106 N.C. App. 664, 668, 417 S.E.2d 823, 827 (1992) (notification of appeal rights was required where petitioner took disability retirement after being told he would be terminated because his resignation was not voluntary). Accordingly, because no statement of appeal rights was ever sent to Hunt, the fifteen-day time limit set out in N.C. Gen. Stat. § 126-35(a) for filing a grievance was never triggered.

This Court has also refused to find that an employee's appeal to OAH was untimely in cases where the agency failed to send a valid notice of appeal rights to the aggrieved employee. *See*, *e.g.*, *Early v. Cty. of Durham Dep't of Soc. Servs.*, 172 N.C. App. 344, 357, 616 S.E.2d 553, 562 (2005) (because employee did not receive notice of appeal rights as required by statute, petition for contested case hearing was timely filed and OAH possessed subject matter jurisdiction over employee's appeal), *disc. review improvidently allowed*, 361 N.C. 113, 637 S.E.2d 539 (2006); *Gray v. Dep't of Env't, Health & Nat. Res.*, 149 N.C. App. 374, 379, 560 S.E.2d 394, 398 (2002) (because of incorrect listing of address of OAH in statement of appeal rights given to employee, deadline for filing petition in OAH was not triggered); *Jordan v. N.C. Dep't of Transp.*, 140 N.C. App. 771, 774-75, 538 S.E.2d 623, 625 (2000) (petitioner's request for contested case hearing was timely filed where agency's statement of appeal rights sent to her did not inform her of her right to contest the designation of her position as "exempt policymaking," the procedure for contesting the designation, or the time limit for filing an objection to the designation), *disc. review denied*, 353 N.C. 376, 547 S.E.2d 412 (2001).[1]

In the present case, Hunt filed his petition in OAH within thirty days of the date he received the letter from DPS refusing to process his grievance. Given DPS's stated refusal to allow Hunt to grieve his discharge, Hunt did not have a duty to take any further steps pursuant to the grievance process. Instead, he was justified in filing his petition in OAH at the

1. While the cases cited above were decided before the General Assembly's 2013 statutory amendments, DPS has failed to direct our attention to any provision of the amendments that excuses the failure of an agency to provide an employee with an adequate statement of his right to appeal an adverse personnel action.

time he did so. Accordingly, we reject DPS's argument that the ALJ erred in denying its motion to dismiss for lack of subject matter jurisdiction.

II. Absence of Just Cause

[2] Having determined that Hunt did not resign and that the ALJ properly concluded OAH possessed subject matter jurisdiction over his appeal, the only remaining question is whether Hunt's discharge was lawful. N.C. Gen. Stat. § 126-35 states that "[n]o career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C. Gen. Stat. § 126-35(a). In order to discharge a state employee, an agency must demonstrate the employee's "unsatisfactory job performance" or "unacceptable personal conduct." 25 N.C.A.C. 1J.0604(b) (2016).

Our resolution of this issue requires no analysis at all. Neither at the OAH proceeding nor in this appeal has DPS argued that it possessed just cause to terminate Hunt's employment. Instead, its entire argument has consistently hinged on the notion that Hunt voluntarily resigned — a proposition that we have rejected. Thus, we agree with the ALJ that Hunt's discharge was not in accordance with North Carolina law. Accordingly, we affirm the ALJ's Final Decision.[2]

III. Award of Attorneys' Fees

[3] Finally, DPS argues that the ALJ erred by awarding attorneys' fees to Hunt because the award was issued (1) in a separate order despite the legal requirement that the ALJ "dispose of all issues in a final decision;" and (2) before the expiration of the ten-day period for DPS to respond to Hunt's petition for fees.

As to its first argument, DPS has failed to cite any legal authority specifically prohibiting an ALJ from awarding attorneys' fees by means of a separate order after issuing a final decision on the merits of the employee's appeal. Thus, this argument is overruled.

With regard to DPS's second argument, it cites 25 N.C.A.C. 3.0115, which states, in pertinent part, as follows: "Any application to the administrative law judge for an order shall be by motion, which shall be in writing unless made during a hearing, and must be filed and served upon all parties not less than ten days before the hearing, if any, is to be held either on the motion or the merits of the case. *The nonmoving*

2. To the extent that DPS's appellate brief seeks to challenge other findings of fact made by the ALJ, none of these additional findings are material to our analysis.

party shall have ten days from the date of service of the motion to file a response." 26 N.C.A.C. 3.0115 (emphasis added).

In its Final Decision, the ALJ directed Hunt to file a petition for attorneys' fees within ten days. Hunt proceeded to file such a petition on 22 August 2017. Six days later, the ALJ issued an order requiring DPS to pay $11,720.00 in attorneys' fees. Even assuming — without deciding — that the ALJ should have allowed DPS ten days in which to respond to Hunt's petition, DPS has failed to show that it was prejudiced by the ALJ's failure to do so.

> Appellate courts do not set aside verdicts and judgments for technical or harmless error. It must appear that the error complained of was material and prejudicial, amounting to a denial of some substantial right. The appellant thus bears the burden of showing not only that an error was committed below, but also that such error was prejudicial—meaning that there was a reasonable possibility that, but for the error, the outcome would have been different.

Faucette v. 6303 Carmel Rd., LLC, 242 N.C. App. 267, 274, 775 S.E.2d 316, 323 (2015) (internal citations and quotation marks omitted).

In its brief, DPS has not asserted that the amount of attorneys' fees awarded was unreasonable or that the fees were not recoverable under applicable law. Thus, because DPS has failed to show that it was actually harmed by the ALJ's failure to allow ten days for it to respond to Hunt's petition, we dismiss this argument.

Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Judges DILLON and INMAN concur.

IN RE J.D.M.-J.

[260 N.C. App. 56 (2018)]

IN THE MATTER OF J.D.M.-J., O.M.L.J.

No. COA17-1328

Filed 19 June 2018

1. Child Abuse, Dependency, and Neglect—neglect—termination of juvenile proceeding—civil custody action—required findings of fact

The trial court erred by failing to make required findings pursuant to N.C.G.S. § 7B-911(c) when it terminated a juvenile proceeding and initiated a civil custody action under Chapter 50.

2. Child Custody and Support—placement—out-of-state relatives—Interstate Compact on the Placement of Children requirements—interests of children

The trial court erred by awarding custody of minor children to their out-of-state aunt and uncle without ensuring that the provisions of the Interstate Compact on the Placement of Children (ICPC) had been satisfied through notification from the other state that the placement did not appear to be contrary to the interests of the children. Where prior decisions were in conflict on this issue, the Court of Appeals followed the older line of cases.

3. Child Custody and Support—custody award—relatives—adequate resources and understanding of significance—evidence

The trial court erred by awarding custody of neglected juveniles to their relatives without first verifying that the relatives had adequate resources to care for the children and understood the legal significance of the placement, pursuant to N.C.G.S. § 7B-906.1(j). The testimony regarding the relatives' income did not state the amount of the income or whether it was sufficient to care for the children, and there was no evidence regarding the relatives' understanding of the legal significance of assuming custody.

4. Child Custody and Support—visitation—children adjudicated neglected—statutory findings

The trial court erred by failing to make necessary findings concerning a mother's visitation rights in a permanency planning review order pursuant to N.C.G.S. § 7B-905.1(c). While the order did address visitation in the event the mother moved to Arizona, where the children were placed with relatives, the order failed to provide any direction as to the frequency or length of visits in the event the

mother did not move to Arizona, and it failed to specify whether visits should be supervised or unsupervised.

Appeal by respondent from order entered 25 August 2017 by Judge Christy E. Wilhelm in Cabarrus County District Court. Heard in the Court of Appeals 31 May 2018.

Hartsell & Williams, PA, by H. Jay White and Austin "Dutch" Entwistle III, for petitioner-appellee Cabarrus County Department of Human Services.

J. Thomas Diepenbrock for respondent-appellant.

Poyner Spruill LLP, by Caroline P. Mackie, for guardian ad litem.

DAVIS, Judge.

A.M. ("Respondent") appeals from an order that awarded custody of her minor children J.D.M.-J. ("Jacob")[1] and O.M.L.J. ("Opal") to their aunt and uncle in Arizona, terminated the juvenile proceeding, and transferred the matter for entry of a civil custody order under Chapter 50 of the North Carolina General Statutes. On appeal, she argues that the trial court failed to (1) comply with the statutory procedure for terminating the proceeding in juvenile court; (2) ensure compliance with the Interstate Compact on the Placement of Children (the "ICPC"); (3) verify that the custodians possessed adequate resources and understood the legal significance of the placement of the children in their custody; and (4) comply with statutory requirements in establishing Respondent's visitation rights. After a thorough review of the record and applicable law, we vacate the trial court's order and remand for further proceedings.

Factual and Procedural Background

Respondent is the mother of Opal and Jacob.[2] Opal was born in December 2006 and Jacob in September 2008. In December 2014, the Cabarrus County Department of Human Services ("DHS") received a report that Respondent had not been properly monitoring Jacob's blood sugar levels in connection with his juvenile diabetes and that the house was not clean or safe for the children.

1. Pseudonyms and initials are used throughout this opinion to protect the identities of the minor children and for ease of reading.

2. The children's father is deceased.

In December 2015 and January 2016, DHS received numerous reports alleging that (1) there was fighting in the home between Respondent and her oldest child ("April")[3]; (2) Respondent was not properly caring for Jacob's diabetes; (3) Opal was not receiving her ADHD medication as prescribed; (4) Jacob was missing school; and (5) Opal and Jacob were attending school with inadequate clothes and inattention to personal hygiene.

DHS began providing in-home services to the family in response to these reports. In April and May 2016, DHS received new reports stating that Respondent was providing inadequate care for both children's medical needs, Opal had been disruptive at school, and Opal was being physically abused by April at home.

On 20 June 2016, Respondent was hospitalized, and Opal and Jacob were staying with a family friend. The friend reported that she was not comfortable caring for the children while Respondent was in the hospital. On 22 June 2016, DHS filed juvenile petitions alleging that Opal and Jacob were neglected juveniles. The children were placed in nonsecure custody with DHS the same day. On 11 August 2016, Respondent consented to an order that adjudicated the children to be neglected, established a primary permanent plan of reunification with a secondary permanent plan of guardianship, and required her to comply with a case plan.

A permanency planning hearing was held on 10 August 2017 before the Honorable Christy E. Wilhelm in Cabarrus County District Court. Respondent testified at the hearing along with Lisa Fullerton and Rachel Willert, two social workers employed by DHS.

On 25 August 2017, the trial court entered a permanency planning order awarding custody of Opal and Jacob to Beverly and Johnnie Worley (the children's maternal aunt and uncle), who lived in Phoenix, Arizona. The court terminated jurisdiction in the juvenile action and ordered that the matter be transferred to a Chapter 50 civil custody action. Respondent filed a timely notice of appeal.

Analysis

On appeal, Respondent argues that the trial court erred by failing to (1) make necessary findings required under N.C. Gen. Stat. § 7B-911 before terminating jurisdiction in the juvenile action; (2) ensure

3. April was not a subject of the order from which appeal is being taken and, therefore, her status is not at issue in this appeal.

compliance with the ICPC; (3) verify that the Worleys had adequate resources to serve as custodians and that they understood the legal significance of the placement of the children in their custody; and (4) make statutorily required findings regarding Respondent's visitation rights. We address each argument in turn.

I. Findings Required by N.C. Gen. Stat. § 7B-911

[1] Respondent initially contends — and both DHS and the guardian *ad litem* ("GAL") concede — that the trial court failed to make required findings in connection with the portion of its order terminating the juvenile proceeding and initiating a civil action under Chapter 50. N.C. Gen. Stat. § 7B-911(c) provides, in relevant part, as follows:

> (a) Upon placing custody with a parent or other appropriate person, the court shall determine whether or not jurisdiction in the juvenile proceeding should be terminated and custody of the juvenile awarded to a parent or other appropriate person pursuant to G.S. 50-13.1, 50-13.2, 50-13.5, and 50-13.7.
>
> (b) When the court enters a custody order under this section, the court shall either cause the order to be filed in an existing civil action relating to the custody of the juvenile or, if there is no other civil action, instruct the clerk to treat the order as the initiation of a civil action for custody.
>
> . . . .
>
> If the court's order initiates a civil action, the court shall designate the parties to the action and determine the most appropriate caption for the case. . . . The order shall constitute a custody determination, and any motion to enforce or modify the custody order shall be filed in the newly created civil action in accordance with the provisions of Chapter 50 of the General Statutes. . . .
>
> (c) *When entering an order under this section, the court shall* . . . .
>
> . . . .
>
> (2) *Make the following findings*:

> *a. There is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding.*
>
> *b. At least six months have passed since the court made a determination that the juvenile's placement with the person to whom the court is awarding custody is the permanent plan for the juvenile, though this finding is not required if the court is awarding custody to a parent or to a person with whom the child was living when the juvenile petition was filed.*

N.C. Gen. Stat. § 7B-911 (2017) (emphasis added).

Here, it is undisputed that the trial court made no findings satisfying either subsection (2)(a) or (2)(b). Nor do the findings it did make allow this Court to infer that these statutory provisions were met. *See In re A.S.*, 182 N.C. App. 139, 144, 641 S.E.2d 400, 403-04 (2007) (upholding order that failed to contain explicit findings under N.C. Gen. Stat. § 7B-911(c)(2) but made findings demonstrating that trial court no longer considered DSS intervention necessary).

Indeed, the trial court's order is internally inconsistent. On the one hand, it requires continued involvement with the juveniles by DHS by stating the following:

> 6. CCDHS should continue to make reasonable efforts to prevent or eliminate the need for placement of the juveniles.
>
> . . . .
>
> 9. The juveniles's [sic] placement and care are the responsibility of CCDHS and the agency shall arrange for the foster care or other placement of the juvenile. CCDHS is granted the authority or [sic] to obtain medical treatment, educational, psychological, or psychiatric treatment and services as deemed appropriate by CCDHS.

On the other hand, however, the order states as follows:

> 3. The court grants custody of the juveniles to Beverly and Johnnie Worley.
>
> . . . .

> 8. This matter is closed. CCDHS and the GAL are released from this matter.
>
> 9. This case is transferred to a Chapter 50 Action.

These conflicting provisions cannot be reconciled. On remand, we instruct the trial court to determine whether or not DHS should continue to have a role over the placement and care of the children or, alternatively, whether it should be released from further obligations. In the event the trial court determines that no further involvement by DHS is necessary, we direct the court to make the findings required by N.C. Gen. Stat. § 7B-911(c)(2).

II. Noncompliance With ICPC

[2] Respondent next contends that the trial court erred in awarding custody to the Worleys in Arizona without ensuring that the provisions of the ICPC had been satisfied. We agree.

In entering a dispositional order that places juveniles in out-of-home care,

> the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. . . . Placement of a juvenile with a relative outside of this State must be in accordance with the Interstate Compact on the Placement of Children.

N.C. Gen. Stat. § 7B-903(a1) (2017).

The ICPC provides, in pertinent part, as follows:

> No sending agency shall send, bring, or cause to be sent or brought into any other party state any child for *placement in foster care or as a preliminary to a possible adoption* unless the sending agency shall comply with each and every requirement set forth in this Article and with the applicable laws of the receiving state governing the placement of children therein.

N.C. Gen. Stat. § 7B-3800, Article III(a) (2017) (emphasis added). The ICPC further requires that before a child is sent to the receiving state, "the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child." N.C. Gen. Stat. § 7B-3800, Article III(d).

DHS and the GAL argue that the children's placement with the Worleys was neither a "placement in foster care" nor "as a preliminary to a possible adoption," meaning that the ICPC does not apply. We have previously rejected a similar argument. *In re V.A.*, 221 N.C. App. 637, 727 S.E.2d 901 (2012), involved a child who was placed in the custody of an out-of-state relative without notification from the receiving state that the placement did not appear to be contrary to the interests of the child. *Id.* at 639-40, 727 S.E.2d at 903. We determined that the trial court was required to comply with the ICPC, stating as follows:

> The ICPC requires that before a juvenile can be placed with an out-of-state relative "the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child." N.C. Gen. Stat. § 7B-3800, Article III(d). This Court has previously interpreted the statutory preference for relative placements in harmony with the ICPC, and held that "a child cannot be placed with an out-of-state relative until favorable completion of an ICPC home study." *In re L.L.*, 172 N.C. App. 689, 702, 616 S.E.2d 392, 400 (2005) (holding that the statutory preference for relative placement and compliance with the ICPC are not mutually exclusive).

Id. at 640, 727 S.E.2d at 904.

We further rejected the argument that the child's placement with relatives did not constitute "foster care."

> According to Regulation 3(4)(26), "foster care" is "24-hour substitute care for children placed away from their parents or guardians and for whom the state agency has placement and care responsibility . . . [which] includes . . . foster homes of relatives" "regardless of whether the foster care facility is licensed and payments are made by the state or local agency for the care of the child." Ass'n of Adm'rs of the ICPC (AAICPC), Reg. No. 3 (amended May 1, 2011). The ICPC defines "placement" as "the care of a child in a family free or boarding home . . . ." N.C. Gen. Stat. §7B-3800, Article II(d). A "family free" home, counter intuitively, is "the home of *a relative or unrelated individual* whether or not the placement recipient receives compensation for care or maintenance of the child." AAICPC, Reg. No. 3(4)(24) (emphasis added).

Id. at 641 n.1, 727 S.E.2d at 904 n.1. Thus, we concluded that the custody placement with the out-of-state relatives was a "placement in foster care," thereby triggering the requirements of the ICPC. *Id.* at 641, 727 S.E.2d at 904.

In arguing that the ICPC does not apply on these facts, DHS and the GAL direct our attention to *In re J.E.*, 182 N.C. App. 612, 643 S.E.2d 70, *disc. review denied*, 361 N.C. 427, 648 S.E.2d 504 (2007). In that case, the respondent-mother argued that the trial court had erred because DSS had not conducted a home study pursuant to the ICPC before placing her children with their maternal grandparents, who lived in Virginia. We held that placement of the minor children with their grandparents did not constitute "foster care" and was not "preliminary to adoption" for purposes of the ICPC. *Id.* at 615, 643 S.E.2d at 72 (citation and quotation marks omitted). Thus, we held that compliance with the ICPC was not required. *Id.*

We acknowledge that the holdings of *J.E.* and *V.A.* are in conflict on this issue. It is axiomatic that we are bound by the prior decisions of this Court. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). However, "it is also well settled that where there is a conflicting line of cases, a panel of this Court should follow the older of those two lines." *Graham v. Deutsche Bank Nat'l Tr. Co.*, 239 N.C. App. 301, 306, 768 S.E.2d 614, 618 (2015) (citation and quotation marks omitted).

Although *J.E.* predates *V.A.*, this Court in *V.A.* expressly relied on our earlier decision in *In re L.L.*, 172 N.C. App. 689, 616 S.E.2d 392 (2005), that "a child cannot be placed with an out-of-state relative until favorable completion of an ICPC home study." *Id.* at 702, 616 S.E.2d at 400. Because *L.L.* was decided before *J.E.*, we conclude that we are bound by the *L.L./V.A.* line of cases.

Based on that line of cases, the ICPC required that Arizona notify DHS the proposed placement of Jacob and Opal did not appear to be contrary to the interests of the children. Because DHS had not received such notification from the appropriate Arizona agency prior to entry of the permanency planning order, the trial court was not authorized to award custody of Opal and Jacob to the Worleys. Accordingly, before any decision is made on remand to once again award custody of the juveniles to the Worleys, the trial court must first confirm that DHS received the required notification from the Arizona agency as mandated by the ICPC.

III. Verifications Concerning Proposed Custodians

[3] Respondent next contends that the trial court erred in awarding custody of the juveniles to the Worleys without first verifying both that (1) the couple had adequate resources to care for the children; and (2) understood the legal significance of the placement. We agree.

N.C. Gen. Stat. § 7B-906.1(j) states as follows:

> If the court determines that the juvenile shall be placed in the custody of an individual other than a parent or appoints an individual guardian of the person pursuant to G.S. 7B-600, the court shall verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile.

N.C. Gen. Stat. § 7B-906.1(j) (2017).

In its order, the trial court made the following findings of fact regarding the Worleys:

> 8. CCDHS initiated an Interstate Compact on Placement of Children, hereinafter referred to as ICPC. All of the paperwork and information needed to comply with the ICPC submission to the state office in Raleigh, North Carolina has been provided by Mr. and Mrs. Worley including criminal checks and financial background information. CCDHS did an independent assessment by using the ICPC template to verify on their own the other steps and requirements taken in an ICPC. An ICPC assessment by Arizona has not been completed.
>
> 9. CCDHS FCS Supervisor Rachel Willert assessed the appropriateness and feasibility for possible placement . . . of [Opal] and [Jacob] with a maternal aunt and uncle, Beverly and Johnnie Worley in Phoenix, AZ. CCDHS FCS Supervisor Rachel Willert traveled to the Worley home, interviewed the family members, the Worley children, and extended relatives. CCDHS found no concerns and the Worley home was safe and appropriate.
>
> 10. Beverly and Johnnie Worley are the maternal aunt and uncle of the juveniles. The juveniles have had substantial contact with Mr. and Mrs. Worley during their lifetime.

Most recently, Mrs. Worley and the juveniles' cousin came to stay with mother for approximately one month. During that time, Mrs. Worley had significant interaction with the juveniles. CCDHS met with mother, the juveniles, and Mrs. Worley during this visit. It was apparent that the juveniles had a strong bond in connection with their relatives.

11. Beverly Worley recently retired from a human services position after 25 years of service. Mr. Worley works with a funeral home on an as-needed basis. The Worley home currently has Mr. and Mrs. Worley along with their 18-year-old son who recently graduated from high school. The Worley's [sic] have two other children who are grown and out of the home. One is working and college [sic] and one is in the military. The Worley's [sic] comfortably live off of Mrs. Worley's retirement and Mr. Worley's income from the funeral home work.

12. Mr. and Mrs. Worley are financially stable and able to provide for the financial needs of the juveniles. Mr. and Mrs. Worley have proven the ability to provide medical care to their own child . . . . Mr. and Mrs. Worley have family within their community as well as extended family outside of their community for support and contact. Mr. and Mrs. Worley are willing and able to provide for the support and care for the juveniles. Mr. and Mrs. Worley have investigated the potential schools and medical care for the children to attend.

13. CCDHS met with or interviewed the Worley children. The youngest child was interviewed in Cabarrus County as well as in his home in Phoenix, AZ. Both CCDHS worker's [sic] found this Worley son to be engaging, respectful, and attentive.

This Court has held that N.C. Gen. Stat. § 7B-906.1(j) does not require the trial court to "make any specific findings in order to make the verification." *J.E.*, 182 N.C. App. at 616-17, 643 S.E.2d at 73. However, we have made clear that the record must show the trial court received and considered reliable evidence that the guardian or custodian had adequate resources and understood the legal significance of custody or guardianship. *See, e.g.*, *In re E.M.*, __ N.C. App. __, __, 790 S.E.2d 863, 872 (2016) ("[N]o evidence in the record supports the court's finding that either of the custodians understand the legal significance of the placement."); *In re P.A.*, 241 N.C. App. 53, 65, 772 S.E.2d 240, 248 (2015)

(trial court's order was not compliant with N.C. Gen. Stat. § 7B-906.1(j) because "there [wa]s no evidence at all of what [the custodian] considered to be 'adequate resources' or what her resources were, other than the fact that she had been providing a residence for [the child]").

Here, although the trial court made findings regarding the adequacy of the Worleys' financial resources to provide for the needs of Jacob and Opal, the court did not receive evidence that was sufficient to support these findings. The court accepted into evidence a report created by DHS that made no mention of the Worleys' actual income or their specific financial resources. The report merely stated that DHS was "currently in the process of assessing the appropriateness and feasibility of placement for [Opal] and [Jacob] with [the] maternal aunt and uncle."

The trial court also heard testimony from Fullerton regarding the Worleys' financial resources:

> [COUNSEL:] And have you checked [the prospective guardians'] finances?
>
> [FULLERTON:] Yes.
>
> [COUNSEL:] And what did you do to check their finances?
>
> [FULLERTON:] Well, we gave them some forms to fill out to list their finances on. And, you know, I didn't have a reason to question what they stated was retirement, you know, benefits that [the maternal aunt] is receiving every month, and then they have additional information [sic] income that is not -- for her husband. He works at the funeral home and that's not always consistent [sic] job. It's kind of based on when the services are needed, so they don't count on that income. It's extra for them.
>
> [COUNSEL:] Have you done any criminal background checks?
>
> [FULLERTON:] Yes.
>
> [COUNSEL:] Have you requested an ICPC home study?
>
> [FULLERTON:] Yes, we did.
>
> [COUNSEL:] And what does that normally include? What do they do when they complete that home study?
>
> [FULLERTON:] I'm not sure.

> [COUNSEL:] Have you been able to do any independent verification of their finances?
>
> [FULLERTON:] I haven't had a reason to, no.
>
> [COUNSEL:] How much time have you spent with the Worleys?
>
> [FULLERTON:] Probably a limited amount. We've just had a number of telephone conversations when Miss Worley was here for about a month in the month of June. And, you know, we spent some time together in conjunction with visits to Miss Miller's home. She also participated in CFT meeting [sic], and we had some conversations after that meeting after that. We have continued to maintain phone contact with her and to discuss her interest in and feasibility of her, you know, receiving custody of the children if it didn't work out with Miss Miller and so those conversations have just -- I guess increased as we've gotten a lot closer to the time.

Willert also testified as follows on this issue:

> [COUNSEL:] How about the finances in regards to Mr. and Mrs. Worley?
>
> [WILLERT:] A financial affidavit was completed . . . .
>
> [COUNSEL:] Were there any concerns?
>
> [WILLERT:] No.
>
> [COUNSEL:] Was there any independent verification of the incomes and the information in the affidavit?
>
> [WILLERT:] We didn't do the checks. It was sent off with the ICPC for verification, but that would be as easy as looking generally for a home study when they have that -- all it is is verifying a bank statement for deposit.

While this testimony constituted evidence that the Worleys did possess *some* income, it did not state the amount of that income or demonstrate that it was sufficient to provide necessary care for the juveniles. Moreover, the social worker's statement that there were no concerns with the Worleys' financial affidavit is too vague to constitute adequate evidence that they did, in fact, possess adequate resources to care for the juveniles.

DHS and the GAL cite *J.E.* in support of their argument regarding the adequacy of the evidence on this issue. In *J.E.*, a department of social services report was provided to the trial court stating that a home study of the custodians' house had been conducted by the department. *J.E.*, 182 N.C. App. at 617, 643 S.E.2d at 73. We held that the home study report supported the trial court's determination that the custodians had adequate resources to care for the minor child. *Id.* Here, conversely, while a home study had been requested, there was no testimony as to the results of the study or whether it had even been completed.

DHS and the GAL point to additional testimony stating that the Worleys (1) have three children of their own; (2) maintain "a stable home and a good home;" and (3) arranged schooling for Opal and Jacob in Arizona and made medical appointments for them. However, none of this evidence is sufficient to comply with N.C. Gen. Stat. § 7B-906.1(j). As discussed above, the trial court did not receive evidence regarding the Worleys' financial resources that was specific enough to enable the court to verify that they possessed adequate resources to provide for the needs of the juveniles. *See P.A.*, 241 N.C. App. at 65, 772 S.E.2d at 248 (vacating and remanding permanency planning and review order where trial court failed to verify whether individual awarded guardianship had adequate resources to care for juvenile).

Furthermore, in addition to the lack of sufficient evidence regarding the Worleys' resources, the trial court also heard no evidence from which it could verify that the Worleys understood the legal significance of assuming custody of Jacob and Opal. "Evidence sufficient to support a factual finding that a potential guardian understands the legal significance of guardianship can include, *inter alia*, testimony from the potential guardian of a desire to take guardianship of the child, the signing of a guardianship agreement acknowledging an understanding of the legal relationship, and testimony from a social worker that the potential guardian was willing to assume legal guardianship." *E.M.*, __ N.C. App. at __, 790 S.E.2d at 872. Neither of the Worleys testified at the 10 August 2017 hearing, and no testimony was offered by DHS that the Worleys were aware of the legal significance of assuming custody of the juveniles. Nor did the Worleys sign a guardianship agreement acknowledging their understanding of the legal relationship.

Thus, for these reasons as well, we must vacate the trial court's award of custody of Jacob and Opal to the Worleys and remand for further proceedings. *See id.* at __, 790 S.E.2d at 872 (vacating award of custody where no evidence was presented supporting court's finding that custodians understood legal significance of placement).

IV. Findings Regarding Visitation

[4] Finally, Respondent contends that the trial court failed to make necessary findings concerning Respondent's visitation rights in the permanency planning review order. DHS and the GAL once again concede error on this issue, and we agree that the court's findings did not fully comply with the applicable statutory requirements.

N.C. Gen. Stat. § 7B-905.1(c) provides, in pertinent part, as follows:

> If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised. . . .

N.C. Gen. Stat. § 7B-905.1(c) (2017).

In the present case, after concluding that visitation with Respondent was in Opal and Jacob's best interests, the trial court ordered that

> [v]isitation between [Opal] and [Jacob] with [Respondent] be coordinated between [Respondent] and [the maternal aunt]. If [Respondent] were to return to live in Arizona, that visitation between [Respondent, Opal, and Jacob] occur weekly for a minimum of 2 hours.

This portion of the court's order is deficient in several respects. First, it fails to provide any direction as to the frequency or length of Respondent's visits in the event that she does *not* return to live in Arizona. Second, it fails to specify whether the visits with Respondent should be supervised or unsupervised. On remand, we instruct the trial court to make new findings on this issue that comply with N.C. Gen. Stat. § 7B-905.1(c). *See In re J.P.*, 230 N.C. App. 523, 530, 750 S.E.2d 543, 548 (2013) (remanding for new findings where trial court failed to specify conditions of visitation as required by statute).

Conclusion

For the reasons stated above, we vacate the trial court's 25 August 2017 order and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges DILLON and BERGER concur.

IN THE MATTER OF R.L.G.

No. COA17-1433

Filed 19 June 2018

1. Child Abuse, Dependency, and Neglect—consent adjudication order—consent by parent—mere stipulation of facts

An order adjudicating a child as neglected was not a valid consent adjudication order under N.C.G.S. § 7B-801(b1) where the order simply contained a stipulation by the parties as to certain facts and the parties did not consent to the child being adjudicated as neglected.

2. Child Abuse, Dependency, and Neglect—neglect—adjudication—sufficiency of findings

The trial court's findings of fact were not sufficient to support its adjudication of neglect where the only findings in support of the adjudication were the mother's admission that the child was a "neglected juvenile," the mother's failure to ensure the child attended school regularly, the child's failing grades in three classes, and the mother's failure to take the child to "well care visits" to address her "medical needs." The mother's admission was a question of law and therefore an invalid stipulation, and the bare facts of the child's missed classes and medical visits—without more information, such as the reason for the problems in school or what medical conditions necessitated the medical visits—were insufficient to support the adjudication.

3. Child Abuse, Dependency, and Neglect—factual stipulations—invited error

The doctrine of invited error did not apply in a child neglect case where the mother admitted at a pre-adjudication hearing that her child was a neglected juvenile. The mother was merely admitting certain facts concerning her daughter's problems in school and missed medical visits, and there was no indication that the mother asked the trial court to adjudicate her child as a neglected juvenile or to remove her from her care.

4. Child Abuse, Dependency, and Neglect—neglect—adjudication—sufficiency of findings

A finding in a pre-hearing order could not serve as a substantive basis for an adjudication of neglect where the trial court did not indicate an intent for any part of the pre-hearing order to do so

and the finding was not one made independently by the trial court but was merely a recitation of a finding made by the Department of Social Services during its investigation.

Appeal by respondent-mother from orders entered 13 September 2017 by Judge W. Fred Gore in Brunswick County District Court. Heard in the Court of Appeals 31 May 2018.

Elva L. Jess for petitioner-appellee Brunswick County Department of Social Services.

Anné C. Wright for respondent-appellant.

Poyner Spruill LLP, by Kate C. Dewberry and Dylan J. Castellino, for guardian ad litem.

DAVIS, Judge.

This case requires us to examine (1) the requirements for a valid consent adjudication order in an abuse, neglect or dependency case; and (2) the extent to which findings in a pre-hearing order can be used to support an adjudication of neglect. A.F. ("Respondent") appeals from adjudication and disposition orders finding her daughter R.L.G. ("Rory")[1] to be a neglected juvenile and continuing her custody with the Brunswick County Department of Social Services ("DSS"). Because we conclude the trial court's determination that Rory was a neglected juvenile was not supported by sufficient evidence or findings of fact, we vacate the adjudication and disposition orders and remand the case to the trial court for further proceedings.

Factual and Procedural Background

Respondent is the mother of Rory, who was born in August 2006. On 25 June 2017, DSS obtained non-secure custody of Rory and filed a petition in Brunswick County District Court alleging that she was a neglected and dependent juvenile. In its petition, DSS stated that in 2013 the Bladen County Department of Social Services had substantiated allegations that Rory was sexually abused by Respondent's boyfriend. The petition further asserted that the boyfriend lived in Respondent's home with Rory and that Respondent had not expressed any concerns

1. Pseudonyms and initials are used throughout this opinion for ease of reading and to protect the juvenile's privacy.

regarding the abuse. In addition, the petition alleged that Rory had also recently been the victim of sexual abuse inflicted by a family friend. According to the petition, Respondent did not seek therapy for Rory as recommended by DSS and failed to meet with the District Attorney's office on two occasions to assist with the prosecution of the case. Finally, the petition stated that Respondent had been unable to provide Rory with an alternative childcare arrangement since 2013.

On 6 July 2017, DSS filed a motion to amend the 25 June 2017 petition to include additional allegations. The amended petition stated, *inter alia*, that Rory was absent from school for twenty-five days during the 2016-17 school year and was tardy on thirty-seven occasions. The motion to amend the petition was subsequently allowed by the court.

The trial court conducted a pre-adjudication hearing on 12 July 2017, and on 21 July 2017 the trial court entered an "Order on Pre-Hearing." An adjudication hearing was held on 16 August 2017. At this hearing, DSS read the following prepared admission by Respondent into the record:

> That admission is that the juvenile is a neglected juvenile in that she did not receive proper care and supervision by her mother in that her mother did not ensure the child attended school regularly, having missed 25 days during the 2016-17 calendar year and having been tardy 37 times. The child did not pass the core classes of English, science, and social studies, and a copy of the report card is tendered in support of said admission. In addition, the mother has not taken the child to well care visits with a physician to address her medical needs.

Respondent stated under oath her agreement to the truth of the above-quoted admission. At that point, the trial court stated that it would "accept the admission and adjudicate based upon the neglect."[2] Morgan Traynham (a social worker for DSS) and Roberta Lerner (the guardian *ad litem* for Rory) testified with regard to a potential trial home placement with Rory's father and the possibility of supervised visitation between Respondent and Rory.

On 13 September 2017, the trial court entered an order (the "Adjudication Order") adjudicating Rory to be a neglected juvenile. That same day, the trial court entered a separate disposition order that (1) continued custody of Rory with DSS; (2) granted Respondent

2. DSS took a voluntary dismissal as to the allegation of dependency that was contained in the petition.

supervised visitation; and (3) ordered DSS to pursue the goal of reunification with Respondent. Respondent filed a timely notice of appeal.[3]

Analysis

I. Trial Court's Order as a Consent Adjudication Order

[1] "[T]he Juvenile Code provides two procedural paths for an adjudication of abuse, neglect, or dependency: an adjudicatory hearing or an adjudication by consent." *In re J.S.C.*, __ N.C. App. __, __, 800 S.E.2d 126, 128 (2017). A consent adjudication "is the agreement of the parties, their decree, entered upon the record with the sanction of the court[.]" *In re Thrift*, 137 N.C. App. 559, 562, 528 S.E.2d 394, 396 (2000) (citation and quotation marks omitted). N.C. Gen. Stat. § 7B-801(b1) permits a trial court to enter a "consent adjudication order" *only if* (1) all parties are present or represented by counsel, who is present and authorized to consent; (2) the juvenile is represented by counsel; and (3) the court makes sufficient findings of fact. N.C. Gen. Stat. § 7B-801(b1) (2017).

Separate and apart from the statutory authorization for consent adjudication orders contained in N.C. Gen. Stat. § 7B-801(b1), a different statute — N.C. Gen. Stat. § 7B-807 — allows factual stipulations made by a party to be used in support of an adjudication. In such cases, a record of the stipulation "shall be made by either reducing the facts to a writing, signed by each party stipulating to them and submitted to the court; or by reading the facts into the record, followed by an oral statement of agreement from each party stipulating to them." N.C. Gen. Stat. § 7B-807(a) (2017).

The initial question before us is whether the trial court's 13 September 2017 order was a valid consent adjudication order such that no additional evidence of neglect needed to be introduced at the adjudication hearing and no further substantive findings of fact by the trial court establishing neglect were necessary to support its adjudication as to Rory. We find our decision in *In re L.G.I.*, 227 N.C. App. 512, 742 S.E.2d 832 (2013), to be particularly instructive. In *L.G.I.*, an adjudicatory hearing took place during which the trial court "read the facts into the record[,]" noting that the juvenile in that case had tested positive for morphine at birth and that the respondent-mother had used illegal substances during her pregnancy. *Id.* at 515, 742 S.E.2d at 835 (citation, quotation marks and brackets omitted). The respondent-mother then agreed under oath to those facts. On appeal, however, she argued that this stipulation was

3. Rory's father is not a party to this appeal.

not sufficient to convert the trial court's adjudication order into a consent adjudication order. We agreed with this argument, concluding that "[a]t most, respondent-mother entered into a stipulation as to certain facts during the adjudication phase of the hearing." *Id.*

In re K.P., __ N.C. App. __, 790 S.E.2d 744 (2016), involved a challenge by the respondent-mother to the trial court's order adjudicating her children to be neglected and dependent in which she contended that the order was not a valid consent adjudication order. *Id.* at __, 790 S.E.2d at 747. The parties had attended a Child Planning Conference prior to an adjudication hearing. At the hearing, the department of social services submitted a report to the trial court indicating that a "Consent Agreement could not be reached at the conference." *Id.* at __, 790 S.E.2d at 748 (quotation marks omitted). The trial court then entered an order adjudicating the children to be neglected and dependent "supported solely by two written reports submitted by DSS at the hearing." *Id.* at __, 790 S.E.2d at 748.

On appeal, DSS argued that the trial court's order was, in fact, a valid consent adjudication order. The order, however, contained no findings that the parties "consented to the children being adjudicated as neglected and dependent." *Id.* at __, 790 S.E.2d at 749. Nor was there any evidence in the record "that a consent agreement had been reached for adjudication or that a consent order had been drafted. . . . Specifically, neither of the parties' attorneys nor the trial court ever stated that respondent was consenting to the adjudication of her children as neglected and dependent." *Id.* at __, 790 S.E.2d at 749. Consequently, we held that the trial court's order failed to meet the requirements of a valid consent adjudication order. *Id.* at __, 790 S.E.2d at 749.

Based on the principles set out in *L.G.I.* and *K.P.*, we conclude that the trial court's Adjudication Order here was not a valid consent adjudication order under N.C. Gen. Stat. § 7B-801(b1). Instead, the Adjudication Order simply contained a stipulation by the parties as to certain facts. Therefore, having determined that the Adjudication Order failed to meet the requirements for a consent adjudication order, we must next consider whether it contained sufficient findings of fact based on competent evidence to support the trial court's determination that Rory was a neglected juvenile.

II. Sufficiency of Findings of Fact in Adjudication Order

[2] We review a trial court's adjudication of neglect "to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the

findings of fact." *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (citation, quotation marks, and brackets omitted), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). "The findings need to be stated with sufficient specificity in order to allow meaningful appellate review." *In re S.C.R.*, 217 N.C. App. 166, 168, 718 S.E.2d 709, 712 (2011) (citation omitted).

N.C. Gen. Stat. § 7B-101 defines a "neglected juvenile" as follows:

> A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or the custody of whom has been unlawfully transferred under G.S. 14-321.2; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2017).

In order for a child to be properly adjudicated as neglected, "this Court has consistently required that there be some physical, mental or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline. " *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (citation and quotation marks omitted). "Whether a child is neglected is a conclusion of law which must be supported by adequate findings of fact." *In re McLean*, 135 N.C. App. 387, 390, 521 S.E.2d 121, 123 (1999) (citation and quotation marks omitted).

In the present case, the findings of fact contained in the trial court's Adjudication Order consisted entirely of the following:

> 1. That the petition alleging the child to be a neglected and dependent juvenile was filed on May 4, 2017 and an order was entered placing the juvenile in the physical and legal custody of [DSS]. The petition was properly signed by the social worker and verified by the Deputy Clerk of Superior Court.
>
> 2. A pre-hearing was conducted on [12 July] 2017 when the Court addressed jurisdictional issues as required by 7B-800.1. The order was entered and filed on July 21, 2017. The findings in said order are incorporated herein by reference as if set out in full.

> 3. The mother, under oath and with the advice of counsel, acknowledged and admitted that the juvenile is a neglected juvenile as defined by N.C. Gen. Stat. § 7B-101(15) in that she did not receive proper care and supervision by her mother as her mother did not insure that the child attended school regularly, having missed twenty-five days during the 2016-17 calendar year and having been tardy thirty-seven times. The child did not pass the core classes of English, Science, and Social Studies. A copy of the child's report card was introduced into evidence in support of said admission. In addition, the child was not taken to well care visits with a physician to address her medical needs.
>
> 4. The child's father does not oppose the admission entered by [Respondent].
>
> 5. That [DSS], in open court, took a voluntary dismissal of the allegation of dependency without prejudice.

Thus, the specific findings purporting to support the court's conclusion of neglect are contained solely in Finding No. 3. First, the trial court stated that Respondent had admitted Rory was a "neglected juvenile." However, the determination of whether a juvenile is neglected within the meaning of N.C. Gen. Stat. § 7B-101(15) is a conclusion of law. *See In re Everette*, 133 N.C. App. 84, 86, 514 S.E.2d 523, 525 (1999) ("Determination that a child is not receiving proper care, supervision, or discipline, requires the exercise of judgment by the trial court, and is more properly a conclusion of law."). It is well established that "stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." *In re A.K.D.*, 227 N.C. App. 58, 60, 745 S.E.2d 7, 9 (2013) (citation, quotation marks, and brackets omitted). Consequently, any "admission" by Respondent that Rory was a neglected juvenile was ineffective to support the trial court's adjudication of neglect.

Second, the trial court stated in Finding No. 3 that (1) Respondent had failed to ensure Rory attended school regularly; (2) Rory had not passed three core classes; and (3) Rory was not taken to "well care visits" with a physician in connection with her "medical needs."

In *In re McMillan*, 30 N.C. App. 235, 226 S.E.2d 693 (1976), this Court upheld an adjudication of neglect where a father refused to allow his children to attend school at all. *Id.* at 236, 226 S.E.2d at 694. In *McMillan*, the father was Native American and testified that he would

not send his children to school because he believed they would not be taught about "Indians and Indian heritage and culture." *Id.* In addition, this Court determined that the children were not provided with "any sufficient alternative education or training" at home. *Id.* at 238, 226 S.E.2d at 695. In affirming the trial court's neglect determination, we concluded that "[i]t is fundamental that a child who receives proper care and supervision in modern times is provided a basic education[,]" and that "when [a child] is deliberately refused this education," she is neglected within the meaning of the Juvenile Code. *Id.*

The facts of the present case are easily distinguishable from *McMillan*. Here, no evidence was presented that Rory was "deliberately refused" an education by Respondent. Furthermore, the trial court made no findings as to the reasons for Rory's missed classes and tardiness or as to how many of Rory's absences were excused. Moreover, the trial court did not expressly find that Rory's failure to pass three classes directly resulted from her absences or from Respondent's failure to provide proper care, supervision, or discipline. Therefore, the stipulated facts regarding Rory's missed classes and the accompanying findings by the trial court fall far short of the scenario presented in *McMillan* and are insufficient to support the conclusion that Rory was a neglected juvenile.

Finally, although N.C. Gen. Stat. § 7B-101(15) includes in its definition of a neglected juvenile one who does not receive "necessary medical care," the trial court's bare finding that Rory was not taken to "well care visits" — without more — is insufficient to support a finding of neglect. There are no findings as to the actual number of missed visits, the reasons they were missed, the medical conditions that necessitated the visits, or the nature or existence of any accompanying adverse effects on Rory's health. Accordingly, we hold that the trial court's findings on this issue are likewise inadequate to support its adjudication of neglect.

[3] DSS makes the following two arguments as to why the trial court's Adjudication Order should nevertheless be upheld: (1) any error by the trial court was "invited" by Respondent; and (2) a finding contained in the Order on Pre-Hearing was sufficient to support the adjudication of neglect. We address each of these arguments in turn.

DSS initially contends that Respondent is prohibited from challenging the trial court's adjudication because she "invited the outcome reached by the trial court" by stipulating to the allegation of neglect. The doctrine of invited error applies to "a legal error that is not a cause for complaint because the error occurred through the fault of the party

now complaining." *Sain v. Adams Auto Grp., Inc.*, 244 N.C. App. 657, 669, 781 S.E.2d 655, 663 (2016) (citation and quotation marks omitted); *see also Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994) ("A party may not complain of action which he induced." (citation omitted)).

In arguing that Respondent invited the trial court to adjudicate Rory as a neglected juvenile, DSS relies on *In re K.C.*, 199 N.C. App. 557, 681 S.E.2d 559 (2009). In that case, the respondent-mother argued on appeal that the trial court erred by "failing to adopt an appropriate visitation plan in its disposition order." *Id.* at 561, 681 S.E.2d at 563. However, the court found that the respondent-mother had "disclaimed any interest in seeing the children until DSS 'fixed' them" and that she had "flatly refused to work with DSS towards reunification even though DSS has offered such things as visitation." *Id.* at 563-64, 681 S.E.2d at 564 (quotation marks and brackets omitted). As a result, this Court held that the respondent-mother was not entitled to appellate relief because she "specifically invited the trial court to honor her wishes by not providing for visitation between herself and the children[.]" *Id.* at 564, 681 S.E.2d at 564.

K.C. is clearly distinguishable from the present case. Here, the record is devoid of any indication that Respondent requested the trial court to adjudicate Rory as a neglected juvenile or remove her daughter from her care. Rather, she merely stipulated to certain facts concerning Rory's school attendance, grades, and missed medical visits. Therefore, the doctrine of invited error is inapplicable.

[4] Next, DSS argues that a finding contained in the trial court's Order on Pre-Hearing supported a finding of neglect as to Rory based on allegations of sexual abuse. In making this argument, DSS directs our attention to the last sentence of Finding No. 2 of the Adjudication Order, which provides that "[t]he findings in [the Order on Pre-Hearing] are incorporated herein by reference as if set out in full." DSS then points to Finding of Fact No. 9 of the Order on Pre-Hearing, which stated as follows:

> 9. There is no reasonable means other than continued custody with [DSS] to protect the juvenile and ensure her safety and the custody order should continue in effect. Efforts to prevent removal of the child from her parents' custody and care were precluded by an immediate threat of harm to the juvenile, and placement of the juvenile in the absence of such efforts was reasonable. [DSS], during an investigation based

> upon allegations received on June 23, 2017, found that [Respondent's] boyfriend, who has been identified as a sexual perpetrator against [Rory], was living in the home. [Respondent] did not find this to be a concern.

The Adjudication Order did not contain any specific references at all to Rory being sexually abused or indicate any concerns on this subject. Nor was any evidence offered on this issue at the adjudication hearing. Nevertheless, DSS contends that the trial court's wholesale incorporation by reference of the findings from the Order on Pre-Hearing properly served as the basis for the adjudication of neglect based on the proposition that Rory was sexually abused by a person living in Respondent's home. We disagree.

The trial court's Order on Pre-Hearing was issued pursuant to N.C. Gen. Stat. § 7B-800.1, which provides, in pertinent part, as follows:

> (a) Prior to the adjudicatory hearing, the court shall consider the following:
>
> (1) Retention or release of provisional counsel.
>
> (2) Identification of the parties to the proceeding.
>
> (3) Whether paternity has been established or efforts made to establish paternity, including the identity and location of any missing parent.
>
> (4) Whether relatives, parents, or other persons with legal custody of a sibling of the juvenile have been identified and notified as potential resources for placement or support.
>
> (5) Whether all summons, service of process, and notice requirements have been met.
>
> (5a) Whether the petition has been properly verified and invokes jurisdiction.
>
> (6) Any pretrial motions, including (i) appointment of a guardian ad litem in accordance with G.S. 7B-602, (ii) discovery motions in accordance with G.S. 7B-700, (iii) amendment of the petition in accordance with G.S. 7B-800, or (iv) any motion for a continuance of the adjudicatory hearing in accordance with G.S. 7B-803.

(7) Any other issue that can be properly addressed as a preliminary matter.

N.C. Gen. Stat. § 7B-800.1 (2017).

As an initial matter, we observe that the trial court did not indicate in Finding No. 2 — or in any other finding — of the Adjudication Order that it believed any specific provisions of the Order on Pre-Hearing were relevant to its determination of neglect. Instead, as noted above, the *only* substantive findings in the Adjudication Order related to missed classes and medical visits. Given that the Adjudication Order describes the Order on Pre-Hearing as having addressed "jurisdictional issues[,]" there is no indication that the court intended for any of the provisions of the Order on Pre-Hearing to constitute a substantive basis for the adjudication of neglect.

Moreover, it is important to note that the portion of Finding of Fact No. 9 in the Order on Pre-Hearing upon which DSS relies is not actually a "finding" at all. Instead, the court simply stated that *DSS* made the finding referenced therein. This Court has held that "[i]n juvenile proceedings, it is permissible for trial courts to consider all written reports and materials submitted in connection with those proceedings. Nevertheless, despite this authority, the trial court may not delegate its fact finding duty by relying wholly on DSS reports and prior court orders." *In re Z.J.T.B.*, 183 N.C. App. 380, 386-87, 645 S.E.2d 206, 211 (2007) (internal citations, quotation marks, and brackets omitted); *see also In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (stating that trial court may not simply recite allegations but must instead find facts that support its conclusions of law). Therefore, for all of these reasons, Finding of Fact No. 9 in the Order on Pre-Hearing did not serve as a valid basis for the trial court's adjudication of Rory as a neglected juvenile.

Conclusion

For the reasons stated above, we vacate the trial court's 13 September 2017 adjudication and disposition[4] orders and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges DILLON and BERGER concur.

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4. Because we are vacating the trial court's adjudication order, we must likewise vacate its disposition order.

JESSIE M. McCLEASE, Plaintiff
v.
DOVER VOLUNTEER FIRE DEPT., Defendant

No. COA17-1123

Filed 19 June 2018

1. Negligence—volunteer fire department—structure fire—reasonableness of response

A resident's claim for negligence against a volunteer fire department for failing to timely respond to a structure fire at her house and to maintain the operability of a fire hydrant by her house was properly dismissed where the resident failed to produce sufficient evidence of either basis for her claim.

2. Emotional Distress—negligent infliction of severe emotional distress—sufficiency of evidence

Plaintiff's evidence was insufficient to support a claim for negligent infliction of severe emotional distress where it did not show that a volunteer fire department acted in a negligent manner when responding to a structure fire at her house, nor that she suffered severe emotional distress where she only attended one appointment with a counselor and never filled a prescription provided by the counselor.

Appeal by plaintiff from order entered 2 June 2017 by Judge John E. Nobles in Craven County Superior Court. Heard in the Court of Appeals 4 April 2018.

J. Elliott Field for plaintiff-appellant.

Sumrell, Sugg, Carmichael, Hicks and Hart, P.A., by Scott C. Hart, for defendant-appellee.

ZACHARY, Judge.

Jessie McClease ("plaintiff") appeals from an order granting Dover Volunteer Fire Department's ("defendant" or "Dover VFD") motion for summary judgment on plaintiff's claims for negligence and negligent infliction of emotional distress. On appeal, plaintiff argues that the trial court erred by granting summary judgment in favor of defendant because genuine issues of material fact existed as to whether defendant was

negligent in that defendant: (1) failed to respond to the structure fire in a timely manner, and (2) failed to maintain or otherwise ensure that the North Oak Street fire hydrant was working properly. After careful review, we affirm the trial court's order.

Background

Plaintiff is a former resident of the Town of Dover, which is located in Craven County, North Carolina. In 1983, plaintiff and her husband purchased a residence on North Oak Street in Dover, where they lived until the residence was destroyed by a fire on 3 August 2013. Defendant is a non-profit corporation established under Chapter 55A of the North Carolina General Statutes that "provides fire suppression services to a six square mile area within Craven County." Plaintiff's residence was located within defendant's fire district.

On 14 October 2015, plaintiff filed a verified complaint in which she asserted claims for negligence and negligent infliction of emotional distress against defendant and the Town of Dover arising from a structure fire on 3 August 2013 that resulted in the destruction of plaintiff's residence. Plaintiff specifically alleged that defendant was negligent in that defendant (1) failed to respond to the structure fire in a timely manner, and (2) failed to maintain or otherwise ensure that the North Oak Street fire hydrant near her home was working properly.

In support of her claims, plaintiff submitted three affidavits. In the first affidavit, plaintiff's niece, Monica Garris, asserts that when she arrived at plaintiff's residence on 3 August 2013, (1) plaintiff's house "was already burned-down to the ground"; (2) "[t]he fire was out and the house was gone"; (3) "the Dover [] VFD was not there"; (4) "Dover VFD came after I arrived"; and (5) "[w]hen Dover VFD got there, they were asking the other fire departments . . . what happened." In the second affidavit, plaintiff's former son-in-law, James Mock, asserts that when he arrived at plaintiff's residence on 3 August 2013, (1) "[t]he house was engulfed in flames"; and (2) "I did not see the Dover VFD at the scene." In the third affidavit, Burt Staton, a former volunteer for defendant, asserts that (1) he heard a fire alarm for fire assistance on Oak Street and drove toward defendant's fire station; (2) there was no response from defendant for assistance after dispatch; (3) when he arrived at the scene, he saw Cove City Volunteer Fire Department had arrived; (4) Cove City Volunteer Fire Department could not use the fire hydrant in front of plaintiff's house so they hooked up a fire hydrant approximately 20 feet away; and (5) Dover VFD finally arrived and was followed by the Jones County Volunteer Fire Department, Fort Barnwell Volunteer

Fire Department, and Township 9 Volunteer Fire Department. Staton asserted that he stayed at the scene for approximately thirty minutes.

The affidavits submitted by defendant and the parties' pleadings allege the following additional facts: Craven County's Communications Center is responsible for receiving all emergency 9-1-1 calls within the county and for dispatching the appropriate response units. If a dispatch remains unanswered for two minutes, the dispatcher will contact additional response units. The dispatch keeps an electronic "Detail Call For Services Report" ("Report") of the total communications made to and from all responding emergency personnel.

When a structure fire is reported, Craven County has an automatic aid policy pursuant to which more than one fire department is automatically dispatched. When a structure fire is reported within defendant's fire district, the Cove City Volunteer Fire Department and the Fort Barnwell Volunteer Fire Department are also dispatched. Because defendant operates with an entirely volunteer staff, there is no internal policy requiring staffing of the station house where defendant's apparatuses are stored. However, each volunteer is issued a pager by which the volunteer is notified when an emergency call is received from within defendant's fire district. Additionally, defendant's leadership, including the Fire Chief, Assistant Chief, and Captains, keep VHF radios in their personal vehicles with which they respond to the Communications Center whenever a call is received. A response from defendant's leadership via VHF radio is transmitted to the other volunteers' pagers to inform them that an emergency call has been received and that defendant is responding.

Upon confirmation that defendant is responding to an emergency, its volunteers may proceed either to defendant's fire station or directly to the location of the emergency, whichever is closer to their location at the time. As defendant's volunteers could be spread throughout the county upon dispatch, many of its volunteers keep their "turnout-gear" in their personal vehicles rather than at the fire house to put on at the scene of the fire.

On 3 August 2013, plaintiff's husband, Mr. McClease, was mowing grass in the yard when he observed smoke coming from the attic of plaintiff's residence and realized that the residence was on fire. He immediately asked the neighbor to call 9-1-1. At 3:07 p.m., the Communications Center received an emergency call from plaintiff's neighbor reporting that plaintiff's residence was on fire. At 3:08 p.m., the Communications Center placed a dispatch call to defendant. Pursuant to the automatic aid agreement, the Cove City Volunteer Fire Department

and the Fort Barnwell Volunteer Fire Department were dispatched at that time as well.

Assistant Chief Eric Pitts and his brother, Captain Ethan Pitts, were at their parents' house when the dispatch came through. They proceeded directly to plaintiff's residence, arriving at 3:11 p.m. according to the Communications Center Report. Defendant's Captain Tyler Whitney was already at the scene performing a "size-up" to determine the appropriate course of action. Capt. Pitts remained at the scene with Capt. Whitney, while Asst. Chief Pitts proceeded to defendant's fire station to get a pumper truck.

Asst. Chief Pitts returned with the pumper truck at 3:21 p.m., and defendant's volunteers hooked up the apparatus to a fire hydrant on Johnson Street, approximately 500 feet from plaintiff's residence. Defendant had notified the Town of Dover that the hydrant across from plaintiff's residence was inoperable approximately a month prior to the fire. However, according to Asst. Chief Pitts, even if the McClease hydrant had been operable, "[i]t was safer and more efficient to simply pull water from the Johnson Street hydrant" because "[c]onnecting either apparatus to the McClease fire hydrant would [have] require[d] a hose to be run around the apparatus thereby creating a trip hazard and limiting the mobility of both apparatus at the scene."

Defendant filed its motion for summary judgment on 12 May 2017, which the trial court granted on 2 June 2017. Plaintiff gave timely notice of appeal.

Standard of Review

This Court reviews a trial court's order granting or denying summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). "Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist." *Draughon v. Harnett County Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (citing *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979)).

The burden of proof governing motions for summary judgment is well established. Initially, the movant "bears the burden of establishing that there is no triable issue of material fact." *DeWitt v. Eveready Battery*

Co., 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (citing *Nicholson v. American Safety Util. Corp.*, 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997)). The movant may meet this burden " 'by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim . . . .' " *Id.* (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)). " '[O]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.' " *Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 448, 579 S.E.2d 505, 507 (2003) (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001)).

"Summary judgment is seldom appropriate in a negligence action. A trial court should only grant such a motion where the plaintiff's forecast of evidence fails to support an essential element of the claim." *Wallen v. Riverside Sports Ctr.*, 173 N.C. App. 408, 411, 618 S.E.2d 858, 861 (2005) (citing *Bostic Packaging, Inc. v. City of Monroe*, 149 N.C. App. 825, 830, 562 S.E.2d 75, 79 (2002)). Nonetheless,"[a] '[p]laintiff is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, [summary judgment] is proper.' " *Frankenmuth Ins. v. City of Hickory*, 235 N.C. App. 31, 34, 760 S.E.2d 98, 101 (2014) (quoting *Young v. Fun Services-Carolina, Inc.*, 122 N.C. App. 157, 162, 468 S.E.2d 260, 263 (1996)).

Discussion

I. Negligence Claim

[1] Plaintiff argues that the trial court erred by granting summary judgment for defendant on plaintiff's claim for negligence because there existed genuine issues of material fact. After careful review, we conclude that plaintiff failed to produce evidence of genuine issues for trial on the issue of negligence.

It is well established that in order to establish a *prima facie* case of negligence against the defendant, the plaintiff must demonstrate that "(1) the defendant owed the plaintiff a duty of care; (2) the defendant's conduct breached that duty; (3) the breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered damages as a result of the injury." *Wallen*, 173 N.C. App. at 411, 618 S.E.2d at 861

(quoting *Vares v. Vares*, 154 N.C. App. 83, 87, 571 S.E.2d 612, 615 (2002), *disc. review denied*, 357 N.C. 67, 579 S.E.2d 576-77 (2003)).

In the present case, plaintiff alleged that defendant was negligent in that defendant (1) failed to respond to the structure fire in a timely manner, and (2) failed to maintain or otherwise ensure that the North Oak Street fire hydrant was working properly. However, plaintiff failed to produce evidence of each element of these claims.

There was no evidence before the trial court that defendant failed to respond in a timely manner. The record established that defendant responded within three minutes of the dispatch and was the primary unit at the scene of the fire. This is a reasonable response time and does not amount to a breach of the duty of reasonable care. Moreover, the affidavits submitted by plaintiff do not support her claim that defendant did not respond in a timely manner. Garris was not at the scene until after the fire was extinguished, and Mock merely asserts that he "did not see [defendant]" at the scene, which does not establish that defendant was not present. Staton's affidavit states that defendant arrived shortly after Cove City Volunteer Fire Department; defendant's apparatus did arrive after a Cove City Rescue Squad's ambulance, but this does not establish that none of defendant's volunteers were on scene and responding to the fire.

In addition, there was no evidence before the trial court that defendant acted in a negligent manner with regard to the fire hydrant in front of plaintiff's residence. Plaintiff failed to put forth any evidence that defendant had a duty to maintain the fire hydrant. The evidence showed that it was the duty of the Town of Dover to maintain the fire hydrant, not that of defendant. Moreover, plaintiff produced no evidence that the inoperability of the fire hydrant was the proximate cause of plaintiff's damages. In fact, the evidence showed that defendant would not have used this fire hydrant, even if it had been operable at the time of the fire.

Plaintiff failed to meet her burden to set forth specific facts establishing every element of her negligence claim. Therefore, defendant was entitled to judgment as a matter of law.

II. Claim for Negligent Infliction of Severe Emotional Distress

[2] Plaintiff also argues that the trial court erred by granting summary judgment for defendant on plaintiff's claim for negligent infliction of emotional distress because there existed genuine issues of material fact. We conclude that plaintiff failed to produce specific facts showing any genuine issues for trial on this claim as well.

A claim of negligent infliction of emotional distress requires proof of negligent conduct. *Pittman v. Hyatt Coin & Gun, Inc.*, 224 N.C. App. 326, 330, 735 S.E.2d 856, 858-59 (2012). Given that plaintiff failed to present evidence establishing a *prima facie* negligence claim, she cannot recover on this cause of action.

Furthermore, no evidence tends to show that plaintiff suffered *severe* emotional distress. Plaintiff attended one appointment with a counselor and never filled the prescription that the counselor provided. This does not establish a "severe and disabling emotional or mental condition," as such is defined under North Carolina law. *Wilkerson v. Duke Univ.*, 229 N.C. App. 670, 675-76, 748 S.E.2d 154, 159 (2013) (citation and quotation marks omitted).

Plaintiff failed to produce evidence to support a *prima facie* case of negligent infliction of emotional distress. Therefore, defendant was entitled to judgment as a matter of law.

III. Immunity

The issues of sovereign, governmental, and statutory immunity were raised in the parties' complaint and answer. However, neither party addresses these issues in their briefs submitted to this Court. Accordingly, we do not consider these issues on appeal.

Conclusion

For the reasons set forth above, the trial court's summary judgment order is

AFFIRMED.

Judges ELMORE and TYSON concur.

RUSSELL v. WOFFORD

[260 N.C. App. 88 (2018)]

VERONICA RUSSELL, PLAINTIFF
v.
DONALD WOFFORD, DEFENDANT

No. COA17-1191

Filed 19 June 2018

1. Firearms and Other Weapons—no contact order—firearms provision added sua sponte—no authority

The provisions of a no-contact order (not a domestic violence prevention order) regarding firearms were reversed. The district court does not have the authority under Chapter 50C of the North Carolina General Statutes sua sponte to order defendant to surrender his firearms, revoke his concealed carry permit, or order defendant not to purchase firearms during the period the order is in effect.

2. Stalking—no-contact order—findings—supporting evidence sufficient

A no-contact order was affirmed (except for provisions regarding firearms) where defendant argued that he did not commit the acts alleged but acknowledged that there was sufficient evidence to support the trial court's findings of fact and did not actually challenge the conclusions of law.

Appeal by defendant from order entered 2 June 2017 by Judge Jeffrey E. Noecker in District Court, New Hanover County. Heard in the Court of Appeals 7 March 2018.

No brief filed on behalf of plaintiff.

Sherman Law, P.C., by Scott G. Sherman, for defendant-appellant.

STROUD, Judge

Defendant appeals no-contact order under North Carolina General Statute Chapter 50C which ordered him to surrender his firearms. Because the trial court had no authority under North Carolina General Statute Chapter 50C to order defendant not to possess or purchase any firearms, to surrender his firearms, or to revoke his concealed carry permit, we reverse and remand the portion of the order with these provisions. We affirm the remaining portions of the order.

I. Background

On or about 23 May 2017, plaintiff filed COMPLAINT FOR NO-CONTACT ORDER FOR STALKING OR NONCONSENSUAL SEXUAL CONDUCT on form AOC-CV-520, Rev. 8/14 against defendant under North Carolina General Statute § 50C-2. Plaintiff alleged defendant grabbed her breasts without her consent, came to her house "making false accusations" and refused to leave, and had his erectile dysfunction medication delivered to her home. Plaintiff marked boxes on the form requesting an *ex parte* temporary order and a permanent no-contact order.[1] Plaintiff also marked all of the boxes 4 through 9 on the form which request that defendant be ordered not to visit her or interfere with her in various ways and to stay away from her children's schools. Plaintiff made no request in the blank areas under box 10 entitled "Other: (specify)[.]" Plaintiff also made no allegations regarding firearms or any threat of physical violence.

The trial court entered an *ex parte* TEMPORARY NO-CONTACT ORDER FOR STALKING OR NONCONSENSUAL SEXUAL CONDUCT, form AOC-CV-523, rev. 10/15, granting the relief as plaintiff requested and setting a hearing on the permanent no-contact order on 2 June 2017. On 2 June 2017, the trial court held the hearing on the permanent no-contact order; plaintiff and defendant were both present and defendant was represented by counsel. Plaintiff did not mention guns or make any request related to guns during her testimony. Defendant mentioned during his testimony he was a former FBI agent, retired police officer, and a veteran; he owned a firearm, and was "authorized to be armed in fifty states twenty-four seven." The trial court entered a NO-CONTACT ORDER FOR STALKING OR NONCONSENSUAL SEXUAL CONDUCT on form AOC-CV-524, Rev. 4/17 under North Carolina General Statute § 50C-7. The order included findings of fact regarding nonconsensual sexual conduct by defendant and concluded that defendant had "committed acts of unlawful conduct against the plaintiff."

In the decree portion of the order, the trial court checked boxes 1 through 6, ordering defendant not to commit various acts such as visiting or stalking the plaintiff. The trial court also checked box 7, entitled "Other: (specify)" and made a handwritten notation ordering:

> Defendant shall surrender to the NH Sheriff's office any and all firearms that he owns, to be held by NH Sheriff

1. Under North Carolina General Statute § 50C-8(b), "[a] permanent civil no-contact order shall be effective for a fixed period of time not to exceed one year[,]" but it can be extended under § 50C-8(c). N.C. Gen. Stat. § 50C-8 (2017).

> for the duration of this order. Defendant's concealed carry permit is revoked for the period of this order. Defendant is prevented from purchasing possessing any firearm for the term of this order.

Defendant filed a timely notice of appeal from the order.

II. Surrender of Firearms

[1] Defendant first contends that the trial court exceeded its authority as granted in North Carolina General Statute § 50C-7 by ordering him to surrender his firearms, not to purchase or possess any firearms, and revoking his concealed carry permit. The order was entered under North Carolina General Statute, Chapter 50C, and presents a question of statutory interpretation. "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009) (citations and quotation marks omitted).

North Carolina General Statute § 50C-7 (2017) provides,

> Upon a finding that the victim has suffered an act of unlawful conduct committed by the respondent, a permanent civil no-contact order may issue if the court additionally finds that process was properly served on the respondent, the respondent has answered the complaint and notice of hearing was given, or the respondent is in default. No permanent civil no-contact order shall be issued without notice to the respondent. Hearings held to consider permanent relief pursuant to this section shall not be held via video conference.

Nothing in North Carolina General Statute Chapter 50C addresses surrender of firearms. North Carolina General Statute § 50C-5 sets forth a list of remedies for a civil no-contact order:

> (b) The court may grant one or more of the following forms of relief in its orders under this Chapter:
>
> (1) Order the respondent not to visit, assault, molest, or otherwise interfere with the victim.
>
> (2) Order the respondent to cease stalking the victim, including at the victim's workplace.
>
> (3) Order the respondent to cease harassment of the victim.

> (4) Order the respondent not to abuse or injure the victim.
>
> (5) Order the respondent not to contact the victim by telephone, written communication, or electronic means.
>
> (6) Order the respondent to refrain from entering or remaining present at the victim's residence, school, place of employment, or other specified places at times when the victim is present.
>
> (7) Order other relief deemed necessary and appropriate by the court, including assessing attorneys' fees to either party.

N.C. Gen. Stat. § 50C-5 (2017). North Carolina General Statute § 50C-11 further provides that "[t]he remedies provided by this Chapter are not exclusive but are additional to other remedies provided under law." N.C. Gen. Stat. § 50C-11 (2017).

This case presents the question of what "other relief" or "additional" remedies the trial court has statutory authority to order, and in particular, whether the court may order surrender of firearms. N.C. Gen. Stat. §§ 50C-5; -11. Because Chapter 50B is a similar statutory scheme which addresses orders issued to protect against acts of domestic violence ("DVPO") arising in a "personal relationship" it is useful to compare the language of the two Chapters and consider the types of relief allowed under Chapter 50B to determine whether surrender of firearms is also a proper remedy under Chapter 50C.[2] *Compare generally* N.C. Gen. Stat. Chap. 50B, 50C (2017). Chapter 50C addresses those situations not covered by Chapter 50B, where the parties are not in a "personal relationship." *See Tyll v. Willets*, 229 N.C. App. 155, 159, 748 S.E.2d 329, 331 (2013) ("North Carolina General Statute § 50C–1 incorporates the definitions of 'personal relationship' from North Carolina General Statute

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2. Chapter 50B addresses parties in a "personal relationship" which is defined as "(1) [a]re current or former spouses; (2) Are persons of opposite sex who live together or have lived together; (3) Are related as parents and children, including others acting in loco parentis to a minor child, or as grandparents and grandchildren. For purposes of this subdivision, an aggrieved party may not obtain an order of protection against a child or grandchild under the age of 16; (4) Have a child in common; (5) Are current or former household members; (6) Are persons of the opposite sex who are in a dating relationship or have been in a dating relationship. For purposes of this subdivision, a dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship. A casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship." N.C. Gen. Stat. 50B-1(b) (2017).

Chapter 50B and excludes them from the category of relationships upon which a Chapter 50C no-contact order can be premised. *See* N.C. Gen. Stat. § 50C–1(8). In doing so, Chapter 50C provides a method of obtaining a no-contact order against another person when the relationship is not romantic, sexual, or familial. *See* N.C. Gen. Stat. §§ 50B–1(b), 50C–1(8).").

North Carolina General Statute § 50B-3(a) sets forth similar types of relief as § 50C-5. *Compare* N.C. Gen. Stat. §§ 50B-3; 50C-5 (2017). North Carolina General Statutes 50B-3 and 50C-5 are not identical, since Chapter 50B includes provisions needed to address possession of a residence, child custody and support, and property issues common between those in a "personal relationship[.]" *Compare* N.C. Gen. Stat. §§ 50B-3; 50C-5; *see generally* N.C. Gen. Stat. 50B-1. North Carolina § 50B-3(a)(13) is a "catch-all" provision which allows the trial court to "[i]nclude any additional prohibitions or requirements the court deems necessary to protect any party or any minor child." N.C. Gen. Stat. § 50B-3(a)(13) (emphasis added). Our Supreme Court has interpreted the "catch-all" provision of § 50B-3(a)(13) and held that the word "any" does not give the trial court unlimited power to order additional relief. *See State v. Elder*, 368 N.C. 70, 773 S.E.2d 51 (2015).

Notably, in comparing Chapters 50B and 50C, Chapter 50C does not mention firearms, while North Carolina General Statute § 50B-3.1, entitled, "Surrender and disposal of firearms; violations; exemptions[,]" sets forth detailed requirements for any DVPO which orders surrender of firearms. *See* N.C. Gen. Stat. § 50B-3.1 (2017). The trial court must make specific findings of fact in the DVPO to justify ordering the surrender of firearms. *See id.* The statute also sets forth the procedure for returning weapons to their owner and disposal of firearms not returned. *See id.* Here, neither the complaint nor the *ex parte* no-contact order mentioned firearms – nor does Chapter 50C – so defendant had no notice of the possibility of an order requiring surrender. Since the trial court imposed this provision after the hearing, *sua sponte*, neither party had an opportunity to address it at the hearing or to object.

In *State v. Elder*, the trial court granted a DVPO which, in addition to the relief enumerated by § 50B-3 provided

> that any Law Enforcement officer serving this Order shall search the Defendant's person, vehicle and residence and seize any and all weapons found. Notably, the court made no findings or conclusions that probable cause existed to search defendant's property or that defendant even owned or possessed a weapon.

Id. at 71, 773 S.E.2d at 52 (quotation marks and brackets omitted). Upon conducting the search directed by the DVPO, law enforcement officers discovered a marijuana growing operation in the defendant's home, leading to criminal charges. *See id.* In his criminal case, our Supreme Court held that the trial court should have allowed the defendant's motion to suppress the evidence obtained from their search of his home under the DVPO because the district court did not have authority to order a search of a home without probable cause or a search warrant:

> Our General Assembly enacted the Domestic Violence Act, N.C.G.S. Chapter 50B, to respond to the serious and invisible problem of domestic violence. Subsection 50B–3(a) states that if a court finds a defendant committed an act of domestic violence, the court must grant a DVPO restraining the defendant from further acts of domestic violence. The statute then lists thirteen types of relief that the court may order in a DVPO. The first twelve are specific prohibitions or requirements imposed on a party to the DVPO. The last type of relief is a catch-all provision that authorizes the court to order any additional prohibitions or requirements the court deems necessary to protect any party or any minor child.
>
> We disagree with the State's contention that the General Assembly intended a broad interpretation of the word "any." The plain language of section 50B–3 does not authorize courts to order law enforcement to search a defendant's person, vehicle, or residence under a DVPO. The word "any" in the catch-all provision modifies "additional prohibitions or requirements," N.C.G.S. § 50B–3(a)(13), and this provision follows a list of twelve other prohibitions or requirements that the judge may impose on a party to a DVPO. For example, the court may prohibit a party from harassing the other party or from purchasing a firearm, and it may require a party to provide housing for his or her spouse and children, to pay spousal and child support, or to complete an abuser treatment program. It follows, then, that the catch-all provision limits the court to ordering a party to act or refrain from acting; the provision does not authorize the court to order law enforcement, which is not a party to the civil DVPO, to proactively search defendant's person, vehicle, or residence.

> Not only is this interpretation demanded by the plain language of the statute, but it is consistent with the protections provided by the Federal and State Constitutions. The Federal and State Constitutions protect fundamental rights by limiting the power of the government. Yet under the State's broad interpretation here, district courts would have seemingly unfettered discretion to order a broad range of remedies in a DVPO so long as the judge believes they are necessary for the protection of any party or child. This interpretation contravenes the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution.

Id. at 72–73, 773 S.E.2d at 53 (citations and quotation marks omitted).

Although the particular issue in *Elder* is different, the same sort of analysis applies here. *See generally Elder*, 368 N.C. 70, 773 S.E.2d 51. Furthermore, the list of relief in North Carolina General Statute Chapter 50C is even more limited than the list of remedies in Chapter 50B; *compare* N.C. Gen. Stat. Chap. 50B; 50C, all of the remedies in § 50C-5 are "ordering a party to act or refrain from acting" in relationship to, in this case, plaintiff. *Elder*, 368 N.C. at 72–73, 773 S.E.2d at 53; *see* N.C. Gen. Stat. § 50C-5. If we were to interpret Chapter 50C to allow the district court to order, *sua sponte*, surrender of firearms, revocation of a concealed carry permit, and forbidding the purchase or possession of firearms, even with no evidence of threatened use of a firearm or any threat of physical harm, this interpretation would allow far broader relief than North Carolina General Statute Chapter 50B does, with no notice to a defendant that he may be required to surrender or not possess firearms. *See generally Elder*, 368 N.C. at 72–73, 773 S.E.2d at 53; N.C. Gen. Stat. Chap. 50B. Even if this order had been entered under Chapter 50B, the order requiring surrender of firearms would have been in error because there was no evidence to support the required findings of fact under North Carolina General Statute § 50B-3.1. *See* N.C. Gen. Stat. § 50B-3.1. District Courts do not have "unfettered discretion to order a broad range of remedies" in a Chapter 50B protective order "so long as the judge believes they are necessary for the protection of any party or child" nor do they have "unfettered discretion" under Chapter 50C to order any relief the judge believes necessary to protect a victim. *Elder*, 368 N.C. at 73, 773 S.E.2d at 52. We understand that the motivation of the trial court was simply to protect plaintiff, but the district court does not have authority under Chapter 50C *sua sponte* to order defendant to

surrender his firearms, revoke his concealed carry permit, or to order him not to purchase or possess any firearms during the period of the no-contact order. We reverse these provisions of the no-contact order.

III. No-Contact Order

[2] Defendant also argues that the trial court should not have entered a no-contact order because he did not commit the acts plaintiff alleged and testified about at the hearing. But defendant's brief acknowledges there was sufficient evidence to support the trial court's findings of fact: "Although the Defendant disagrees with the Court's actual finding, the Defendant concedes that the Court had the right and opportunity to view the evidence in the way the Court did and that the evidence, so construed, may uphold an Order for Non-Consensual Sexual Conduct." Defendant does not actually challenge either the findings of fact or the conclusions of law in the no-contact order, so we affirm the order except as to the provisions regarding firearms discussed above.

IV. Conclusion

The district court exceeded its authority under North Carolina General Statute Chapter 50C by ordering defendant to surrender his firearms, revoking his concealed carry permit, and ordering him not to purchase or possess firearms during the period of the no-contact order. We reverse the provisions of the order addressing firearms. We remand to the trial court to determine if any additional order is needed to direct the New Hanover Sheriff's Office to return defendant's firearms, and if so, to enter such an order. We affirm the remainder of the order.

AFFIRMED in part; REVERSED and REMANDED in part.

Judges DAVIS and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
BRANDON MARQUIS COZART, DEFENDANT

No. COA17-535

Filed 19 June 2018

1. Satellite-Based Monitoring—no written notice of appeal at trial—writ of certiorari denied

Defendant's petition for certiorari from the imposition of lifetime satellite-based monitoring (SBM) was denied where defendant gave only an oral notice of appeal and no written notice appeal was served on the parties. Since SBM is a civil proceeding, the requirements of Appellate Rule 3 must be met to confer appellate jurisdiction, including a written notice of appeal.

2. Appeal and Error—Rules of Appellate Procedure—motion to suspend

Defendant's motion to suspend the Appellate Rules of Procedure to reach the merits of his satellite-based monitoring (SBM) sentence was denied where he did not argue how his failure to object to the imposition of lifetime SBM resulted in fundamental error or manifest injustice.

3. Constitutional Law—right to counsel—substitution of appointed counsel

The trial court did not abuse its discretion by denying defendant's motion to discharge appointed counsel where the trial court allowed defendant the opportunity to explain his desire to discharge his appointed counsel, inquired into defendant's competence before ruling, and treated the motion as one for a continuance and to substitute counsel.

4. Constitutional Law—effective assistance of counsel—pre-trial plea bargaining

Defendant's argument that he received inadequate representation was dismissed where the record was not sufficient to determine whether trial counsel was ineffective.

Judge ZACHARY concurring.

Appeal by defendant from an order entered 8 September 2016 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 2 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Sherri H. Lawrence, for the State.

Paul F. Herzog for defendant-appellant.

BERGER, Judge.

On September 8, 2016, a Wake County jury found Brandon Marquis Cozart ("Defendant") guilty of three counts of statutory rape and two counts of indecent liberties with a child. Defendant appeals, contending the trial court failed to conduct a *Grady* hearing prior to imposing lifetime satellite-based monitoring ("SBM"), failed to substitute court appointed counsel upon his request, and he received ineffective assistance of counsel ("IAC"). We hold that Defendant failed to properly appeal the imposition of SBM. Further, we deny his petition for writ of certiorari, find no error regarding the trial court's inquiry concerning discharge of counsel, and dismiss his IAC claim without prejudice.

Factual and Procedural Background

In 2014, Defendant, along with his fiancée and infant son, moved into the home of his friend, Montrail Alexander ("Alexander"). Fourteen year old Mary[1] lived across the street with her mother, siblings, and grandparents. Mary would frequently visit Alexander's house for sleepovers and family events because Mary's mother was close friends with Alexander. Mary regarded Alexander as a "big brother," and had been visiting him for seven or eight years.

Mary met Defendant at Alexander's house for the first time in February 2014. Mary and her siblings would visit Alexander's house three to four times a week, and sleep over every other weekend. Defendant made remarks to Mary and her younger sister about their appearance that made them uncomfortable, and, as a result, their visits to Alexander's house became less frequent.

Mary testified that in March or mid-April of 2014, she decided to spend the night at Alexander's house with her two younger sisters and two step-brothers, despite feeling uneasy. That night, Alexander's

1. Pseudonyms are used throughout to protect the juveniles' identities and for ease of reading pursuant to N.C.R. App. P. 3.1(b).

family slept in their own bedroom, Defendant slept in his bedroom with his family, and the children all slept in the living room, with Mary on the couch. Mary heard Defendant go to the bathroom, and when he came out, he approached her, put his hand over her mouth, and told her to be quiet. Defendant forcibly undressed Mary and made her have unprotected vaginal intercourse with him. Mary testified there was blood in her underwear and she did not know what to do because she was scared. Mary returned to her home the next morning and did not tell anyone what happened.

A few weeks later, Mary went over to Alexander's house again to see his newborn baby. Defendant was the only adult in the house. After she entered, Defendant forced Mary against the living room couch while she said "no" repeatedly. Defendant then made Mary go into the hallway where he forcibly removed her pants and underwear and engaged in sexual intercourse with her. Defendant stopped after Mary told him her stomach was hurting. When Alexander's girlfriend came home, Mary left. After this incident, Mary was bleeding heavily and had semen in her vagina. Mary did not tell her mother about the specific encounters because she was afraid her family would not believe her.

Defendant moved out of Alexander's house in June 2014, and Mary had no further sexual encounters with him. In late June, Mary found out that she was pregnant after taking two pregnancy tests, and messaged Defendant on Facebook regarding the pregnancy.

After reporting the incident to law enforcement, the Garner Police Department started an investigation. Investigators obtained DNA samples from Mary, Defendant, and Mary's child who was born in January 2015. DNA analysis showed there was a 99.9999 percent probability that Defendant was the father of Mary's child. On September 30, 2014, the Garner Police Department arrested Defendant for two counts of felony statutory rape of a person thirteen, fourteen, or fifteen years old.

On September 25, 2014, prior to Defendant's arrest, Chelsea, a fifteen-year-old runaway, met Defendant on the street at Moore Square in downtown Raleigh. Defendant approached Chelsea and initiated a conversation. Defendant told her about his son's birthday party at a local hotel. Chelsea went with Defendant to the hotel, thinking that it would be a birthday party. Defendant initiated a sexual encounter with Chelsea. Chelsea testified that she did not want Defendant to have sex with her, but eventually acquiesced. Defendant had sexual intercourse with Chelsea twice at his insistence in the hotel room.

After the encounter, Chelsea left the hotel and did not talk about the incident until she spoke with Detective William Tripp with the Raleigh Police Department on September 26, 2014. Chelsea underwent a child medical exam at SAFEchild Advocacy Center in Raleigh based on a recommendation by Detective Tripp. Chelsea again identified Defendant as the man who had sexual intercourse with her in an interview at the center.

On September 30, 2014, Defendant was arrested for three counts of felony statutory rape of a person thirteen, fourteen, or fifteen years old, and two counts of indecent liberties with a child. On October 27 and 28, 2014, a Wake County Grand Jury indicted Defendant for five counts of statutory rape of a person thirteen, fourteen, or fifteen years old and three counts of taking indecent liberties with a child. The offenses were joined for trial.

At the close of the State's evidence at trial, one count of statutory rape was dismissed by the trial court for lack of evidence. The jury found Defendant guilty of three counts of statutory rape of a person thirteen, fourteen, or fifteen years old, and two counts of taking indecent liberties with a child. Defendant was sentenced to two consecutive active sentences of 300 to 420 months imprisonment. Upon his release, Defendant was ordered to register as a sex offender for life and enroll in lifetime SBM. Defendant gave oral notice of appeal.

Analysis

I. Satellite-Based Monitoring

[1] Defendant concedes that the oral notice of appeal was insufficient to confer jurisdiction to this Court to consider his SBM claim. On July 28, 2017, Defendant filed a petition for writ of certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure regarding the imposition of SBM upon his release for the remainder of his natural life. *See* N.C.R. App. P. 21(c). Defendant requests that this Court grant a petition for writ of certiorari to hear his appeal on this issue, and then suspend the Appellate Rules under Rule 2 to reach the merits of his unpreserved constitutional argument. We deny Defendant's requests.

"Our Court has held that SBM hearings and proceedings are not criminal actions, but are instead a civil regulatory scheme." *State v. Brooks*, 204 N.C. App. 193, 194, 693 S.E.2d 204, 206 (2010) (citation, internal quotation marks, and brackets omitted). "In light of our decisions interpreting an SBM hearing as not being a criminal trial or proceeding for purposes of appeal, we must hold that oral notice pursuant to N.C.R.

App. P. 4(a)(1) is insufficient to confer jurisdiction on this Court. *Id.* at 194-95, 693 S.E.2d at 206. Here, Defendant gave oral notice of appeal in open court. Defendant concedes his oral notice of appeal was defective regarding this issue since SBM hearings are civil proceedings. Oral notice of appeal is insufficient in civil proceedings to confer jurisdiction to this Court under Rule 3 of the North Carolina Rules of Appellate Procedure.

Rule 3 provides that, for appeals from civil proceedings,

> Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by *filing notice of appeal with the clerk of superior court* and serving copies thereof upon all other parties within the time prescribed by subsection (c) of this rule.

N.C.R. App. P. 3(a) (emphasis added). "Appellate Rule 3 is jurisdictional and if the requirements of this rule are not complied with, the appeal must be dismissed." *Currin-Dillehay Bldg. Supply v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683, 683 (citation omitted), *appeal dismissed and disc. review denied*, 327 N.C. 633, 399 S.E.2d 326 (1990).

On September 8, 2016, Defendant gave oral notice of appeal in open court after being sentenced in the instant case. However, Defendant's appeal only concerns SBM, and not the underlying crime or conviction; therefore, it is wholly civil in nature, and compliance with Rule 3(a) is imperative. *Brooks*, 204 N.C. App. at 194, 693 S.E.2d at 206. No written notice of appeal was served upon the parties in this case.

"[W]rit of certiorari *may* be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C.R. App. P. 21(a)(1) (emphasis added). "If this Court routinely allowed a writ of certiorari in every case in which the appellant failed to properly appeal, it would render meaningless the rules governing the time and manner of noticing appeals." *State v. Bishop*, ___ N.C. App. ___, ___, 805 S.E.2d 367, 369 (2017), *disc. review denied*, ___ N.C. ___, 811 S.E.2d 159 (2018). "[A]s with other constitutional arguments, a defendant's Fourth Amendment SBM challenge must be properly asserted at the hearing in order to preserve the issue for appeal." *State v. Grady* ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, COA17-12, 2018 WL 2206344, *3 (2018).

We recognize that in various prior cases, this Court has issued a writ of certiorari to hear SBM appeals. However, the cases relied upon

by Defendant were heard when "neither party had the benefit of this Court's analysis in [*State v.*] *Blue* and [*State v.*] *Morris*." *Bishop*, ___ N.C. App. at ___, 805 S.E.2d at 369 (citation and brackets omitted); *see State v. Blue*, ___ N.C. App. ___, ___, 783 S.E.2d 524, 526-27 (2016); *State v. Morris*, ___ N.C. App. ___, ___, 783 S.E.2d 528, 529-30 (2016). Defendant had full knowledge and notice of the proper procedure necessary to notice an appeal concerning SBM implementation in the instant case. Accordingly, we decline to grant certiorari.

[2] Defendant also requests we suspend the North Carolina Rules of Appellate Procedure to reach the merits of SBM implementation by the trial court because the trial court committed a "sentencing error" that was "so fundamental as to have resulted in a clear miscarriage of justice." Defendant relies on two cases, *State v. Dudley*, 319 N.C. 656, 356 S.E.2d 361 (1987) and *State v. Mulder*, 233 N.C. App. 82, 755 S.E.2d 98 (2014), to support his argument. However, both *Dudley* and *Mulder* concern double jeopardy appeals for a criminal trial, and are not relevant to our analysis.

Defendant has not properly argued on appeal how his failure to object to the imposition of lifetime SBM resulted in a fundamental error or manifest injustice. As in *Bishop*, because Defendant is

> no different from other defendants who failed to preserve their constitutional arguments in the trial court, and because he has not argued any specific facts that demonstrate manifest injustice if we decline to invoke Rule 2, we do not believe this case is an appropriate use of that extraordinary step.

Bishop, ___ N.C. App. at ___, 805 S.E.2d at 370. Therefore, we deny Defendant's petition for writ of certiorari to review the imposition of SBM on appeal.

II. Motion to Discharge Counsel in Criminal Trial

[3] Defendant contends the trial court erred in failing to appoint substitute trial counsel, and this failure resulted in Defendant suffering prejudicial error due to ineffective assistance of counsel. We disagree. This issue arises from a judgment from a superior court in a criminal action, and therefore is properly before this Court pursuant to Rule 4(a) of the North Carolina Rules of Appellate Procedure.

"Absent a showing of a sixth amendment violation, the decision of whether appointed counsel shall be replaced is a matter committed to the sound discretion of the trial court." *State v. Hutchins*, 303 N.C. 321,

336, 279 S.E.2d 788, 798 (1981) (citation omitted). The right to appointed counsel does not "include the privilege to insist that counsel be removed and replaced with other counsel merely because defendant becomes dissatisfied with his attorney's services." *State v. Sweezy*, 291 N.C. 366, 371, 230 S.E.2d 524, 528 (1976) (citations omitted).

Here, the trial court allowed Defendant the opportunity to explain why he wanted to discharge his appointed counsel. Defendant explained that his family was attempting to hire an attorney; that he was dissatisfied with the amount of contact and visitation that trial counsel had afforded him prior to going to trial; and he was dissatisfied with the content of one of the visits concerning the discussion of a plea agreement. Upon its own motion, the trial court inquired as to Defendant's competence, and deemed him competent to proceed before ruling on his motion. The trial court treated Defendant's request as both a motion to substitute counsel and a motion to continue, and denied both motions. There is no evidence in the record indicating the trial court abused its discretion in denying Defendant's motion to discharge appointed counsel, and we hold the trial court did not err.

[4] Defendant further asserts that his trial counsel provided ineffective assistance during pre-trial plea bargaining. "It is manifest that there are no hard and fast rules that can be employed to determine whether a defendant has been denied the effective assistance of counsel." *Hutchins*, 303 N.C. at 336, 279 S.E.2d at 798 (citations omitted). "Instead, each case must be examined on an individual basis so that the totality of its circumstances are considered." *Id.* (citations omitted). "IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524, *reconsideration denied*, 354 N.C. 576, 558 S.E.2d 862 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). This Court "limits its review to material included in 'the record on appeal and the verbatim transcript of proceedings, if one is designated.' " *Id.* at 166, 557 S.E.2d at 525 (citing N.C.R. App. P. 9(a)).

In the case *sub judice*, the record is insufficient to determine whether trial counsel was ineffective. Therefore, we dismiss Defendant's IAC claim without prejudice. *State v. Todd*, 369 N.C. 707, 712, 799 S.E.2d 834, 838 (2017).

Conclusion

Defendant did not properly file civil notice of appeal to this Court regarding the trial court's imposition of SBM, and, in our discretion, we deny his petition for writ of certiorari. The trial court did not err in its denial of Defendant's motion to substitute counsel in the criminal trial. There is insufficient evidence in the record on appeal to reach the merits of Defendant's IAC claim for the criminal trial, and we dismiss without prejudice.

NO ERROR IN PART AND DISMISSED IN PART.

Judge DAVIS concurs.

Judge ZACHARY concurs with separate opinion.

ZACHARY, Judge, concurring.

As Defendant did not object in the trial court to the constitutionality of his enrollment in satellite-based monitoring, in order to reach the merits of that argument this Court would be required—in addition to allowing certiorari—to take the extraordinary step of invoking Rule 2. The Majority declines to do so, and I concur. I write separately to convey my disquiet with this outcome.

In *State v. Bishop*, we noted that a petition for writ of certiorari " 'must show merit[.]' " *State v. Bishop*, ___ N.C. App. ___, ___, 805 S.E.2d 367, 369 (2017) (quoting *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959)). Given that the defendant's argument in *Bishop* concerning the constitutionality of the satellite-based monitoring order was "procedurally barred because he failed to raise it in the trial court," we declined to issue "a writ of certiorari to review [that] unpreserved argument on direct appeal." *Id.* at ___, 805 S.E.2d at 369, 370.

While the case at bar is in all relevant points similar to *Bishop*, whether to invoke Rule 2 in any particular case remains within the sound discretion of this Court. *State v. Hill*, ___ N.C. App. ___, ___, 785 S.E.2d 178, 182 (2016). Nevertheless, " 'inconsistent application' of Rule 2 . . . leads to injustice when some similarly situated litigants are permitted to benefit from it but others are not." *Bishop*, ___ N.C. App. at ___, 805 S.E.2d at 370 (quoting *State v. Hart*, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007)). I therefore concur in the Majority's decision not to invoke Rule 2 in the instant case.

I write separately to express my concern with the harshness of this result. A defendant is left with no recourse in the event that his counsel fails to object to the constitutionality of satellite-based monitoring before the trial court, which happens with some frequency. *E.g.*, *State v. Spinks*, ___ N.C. App. ___, 808 S.E.2d 350 (2017); *State v. Harding*, ___ N.C. App. ___, ___ S.E.2d ___, 2018 N.C. App. LEXIS 245. Moreover, where a defendant is denied appellate review based on an error of counsel, ordinarily the last avenue of relief is to file a motion for appropriate relief alleging ineffective assistance of counsel. However, where counsel's error pertains to satellite-based monitoring, an ineffective assistance of counsel claim is not available to the defendant. *State v. Wagoner*, 199 N.C. App. 321, 332, 683 S.E.2d 391, 400 (2009) ("[A] claim for ineffective assistance of counsel is available only in criminal matters, and we have already concluded that [satellite-based monitoring] is not a criminal punishment."). I regret the application of our Appellate Rules in such a manner that a defendant is deprived of any relief from a potentially unconstitutional order, particularly in light of this Court's recent holding in *State v. Grady*, 2018 N.C. App. LEXIS 460.

STATE OF NORTH CAROLINA
v.
EDWARD EARL JONES, DEFENDANT

No. COA17-114

Filed 19 June 2018

1. Appeal and Error—direct appeal and motion for appropriate relief—resolution on direct appeal—MAR denied

Defendant's motion for appropriate relief from an assault conviction was denied where the issue could be resolved on direct appeal.

2. Constitutional Law—effective assistance of counsel—failure to raise self-defense—obvious claim

Defendant received effective assistance of counsel in an assault prosecution even though he contended that his trial counsel failed to present self-defense. Defense counsel stipulated to the State's introduction of defendant's interview with the police in which he asserted self-defense, defendant did not argue that there was additional evidence beyond that evidence, and the issue of self-defense

was obvious. This was a bench trial, and there was no evidence that the trial judge did not consider self-defense.

Appeal by defendant from judgment entered on or about 1 August 2016 by Judge Ola M. Lewis in Superior Court, Brunswick County. Heard in the Court of Appeals 23 August 2017.

Attorney General Joshua H Stein, by Assistant Attorney General Jeremy D. Lindsley, for the State.

New Hanover County Public Defender Jennifer Harjo, by Assistant Public Defender Brendan O'Donnell, for defendant.

STROUD, Judge.

Defendant Edward Earl Jones ("defendant") appeals from his conviction of assault with a deadly weapon with intent to kill inflicting serious injury. On appeal, defendant contends that he was denied his fundamental right to effective assistance of counsel and contends that his defense counsel failed to argue self-defense on his behalf. But the record indicates that counsel did stipulate to the State's admission of evidence of self-defense and argued self-defense in the closing argument. We therefore hold that defendant did not receive ineffective assistance of counsel and find no error with the trial court's judgment.

Background

On 15 November 2015, Brunswick County 911 operators received three phone calls from a male, later identified as defendant, who stated that he had stabbed his wife, she was bleeding badly, and he had left their home in Southport, North Carolina. Defendant's wife, Mary,[1] also called 911 and reported that she had been stabbed in her chest and arm by her husband. Mary told the 911 operator that defendant had left their home and may be driving a black Chrysler 200 vehicle. An officer received a radio call describing the vehicle and realized that he had just passed a vehicle fitting that description, so he turned around and stopped the vehicle. Defendant, the driver of the vehicle, put his hands up and told the officer he was on his way to the Brunswick County Sheriff's Office to turn himself in after stabbing his wife during an argument that morning.

1. We use a pseudonym to protect the identity of the victim.

Defendant was arrested and charged with felony assault with a deadly weapon with intent to kill inflicting serious injury. He voluntarily submitted to an interview with police. Defendant explained his version of events during that interview with police, stating that just prior to the incident, he received a call from his daughter claiming that Mary had just told her not bring her daughter -- defendant's granddaughter -- to the house that day for defendant to watch because he was going to be arrested. Defendant said that when he confronted Mary in the bedroom about the phone call, she threatened him and produced a kitchen knife, so he removed his pocketknife from his pocket and stabbed Mary at least once to get her to drop the knife.

Defendant was indicted on or about 7 December 2015. Defendant waived his right to a jury trial, and the matter proceeded to a bench trial on 28 and 29 July 2016 and concluded on 1 August 2016. Mary testified at defendant's trial that defendant entered the bedroom and said " 'Bitch, . . . I'm going to kill you. You turned against me for everybody else.' " He stabbed her with the kitchen knife, said " 'You're going to die[,]' " and then stabbed her again with his pocketknife. She could not remember the third stabbing, but afterward he stabbed her in the chest, she started hollering " 'I'm dying.' " The trial court found defendant guilty as charged and entered a judgment on or about 1 August 2016. Defendant timely filed notice of appeal to this Court.

Defendant's MAR

[1] Defendant contemporaneously filed a Motion for Appropriate Relief ("MAR") with his direct appeal. Defendant's MAR includes an attachment of an affidavit from his trial attorney. We would only consider granting defendant's MAR if we could not address his claims on the face of the record on direct appeal; and if that were the case, we would have to remand the matter to the trial court for an evidentiary hearing. *See, e.g.*, *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524-25 (2001) ("IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. This rule is consistent with the general principle that, on direct appeal, the reviewing court ordinarily limits its review to material included in the record on appeal and the verbatim transcript of proceedings, if one is designated." (Citations and quotation marks omitted)). Because we can resolve this issue on direct appeal, remanding for a hearing on defendant's MAR is unnecessary. We deny defendant's MAR.

Direct Appeal: IAC Claim

[2] Defendant's sole argument on appeal is that he was denied his fundamental right to effective assistance of counsel because his trial counsel "inexplicably" failed to present the defense of self-defense.

> To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citations and quotation marks omitted).

First, we note that we generally refrain from critiquing trial counsel's decision to pursue or not pursue a particular defense. *See State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002) ("Decisions concerning which defenses to pursue are matters of trial strategy and are not generally second-guessed by this Court."). Defendant notes that his counsel did not give pre-trial notice of his intention to present a defense of self-defense as required in certain circumstances under N.C. Gen. Stat. § 15A-905(c) (2017), and that he failed to "mention self-defense in his opening statement, failed to ask the court at the close of evidence to consider self-defense, and failed to argue in his closing that [defendant] was entitled to acquittal based on self-defense."

The sanction for failure to give notice of a defense of self-defense is normally exclusion of evidence upon the State's objection or refusal to give a jury instruction on self-defense. *See State v. Pender*, 218 N.C. App. 233, 243, 720 S.E.2d 836, 842 (2012) ("If at any time during the course of the proceedings the court determines that a party has failed to comply with [N.C. Gen. Stat. § 15A-905(c)(1)] or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may prohibit the party from introducing evidence not disclosed. Which of the several remedies available under G.S. 15A-910(a) should be applied in a particular case is a matter within the trial court's sound discretion." (Citations, quotation marks, brackets, and ellipses omitted)). But at trial, the State did not object to presentation of evidence regarding

self-defense. As noted by the State, defendant's counsel stipulated to the State's introduction of evidence of portions of defendant's interview with the police which presented his assertion of self-defense. The facts summarized above regarding defendant's explanation of the stabbing are based upon that evidence. Defendant does not argue or allege that there is additional evidence of self-defense that he would have presented at trial or that he was prevented from presenting any evidence supporting his defense; his argument as to the evidence of self-defense is based entirely upon his police interview, the physical evidence, and cross-examination testimony of the State's witnesses.

In the evidence presented at trial, the issue of self-defense was obvious. Defendant called and admitted to 911 operators he had stabbed his wife, but emphasized in his interview with police he did so only because she was coming at him wielding a knife. The recording of defendant's interview with police was entered into evidence, with both defendant and the State agreeing on which portions to include. During the police interview, defendant claimed that his wife had a kitchen knife first and that he only pulled out his pocket knife to defend himself and get her to drop her knife. Defense counsel did extensive cross-examination seeking to support the defendant's claim that Mary was the first person to produce a knife. The opening and closing arguments to the court by both the State and defendant were very brief, which is not unusual in a bench trial. But defendant's counsel did refer to self-defense in his closing argument:

> He did stab her. He testified in his interview when they're tussling over the knife, he popped her in the arm with his -- he reached in with his pocketknife, popped her in the arm to -- to get her to release. So, yeah, in that sense, he did stab her; in self-defense to extricate himself from a situation where they're fighting over a -- a big nasty knife.

Because defendant waived his right to a trial by jury, the matter proceeded to a bench trial, and the trial court, as factfinder, determined whether to convict defendant. Defendant argues that his counsel's failure to give notice of his defense of self-defense prior to trial somehow eliminated the trial court's ability or authority to consider this defense, but he cites no authority for this assertion. Bench trials differ from jury trials since there are no jury instructions and no verdict sheet to show exactly what the trial court considered, but we also presume that the trial court knows and follows the applicable law unless an appellant shows otherwise. *See State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968) ("An appellate court is not required to, and should not,

assume error by the trial judge when none appears on the record before the appellate court."). We follow this presumption in many contexts. For example, in a jury trial, if the trial court allows the jury to hear inadmissible evidence, this may be reason for reversal and a new trial, if such errors were material and prejudicial. *See*, *e.g.*, *State v. Alston*, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983) ("Evidence without any tendency to prove a fact in issue is inadmissible, although the admission of such evidence is not reversible error unless it is of such a nature to mislead the jury. The defendant is not entitled to a new trial based on trial errors unless such errors were material and prejudicial." (Citations omitted)). But in a bench trial, we presume the trial court ignored any inadmissible evidence unless the defendant can show otherwise. *See State v. Jones*, __ N.C. App. __, __, 789 S.E.2d 651, 656 (2016) ("Because trial judges are presumed to ignore inadmissible evidence when they serve as the finder of fact in a bench trial, no prejudice exists simply by virtue of the fact that such evidence was made known to them absent a showing by the defendant of facts tending to rebut this presumption."). We presume the trial court has followed "basic rules of procedure" in bench trials. *Williams v. Illinois*, 567 U.S. 50, 69-70, 183 L. Ed. 2d 89, 106, 132 S. Ct. 2221, 2235 (2012) ("There is a well-established presumption that the judge has adhered to basic rules of procedure when the judge is acting as a factfinder." (Citation, quotation marks, brackets, and emphasis omitted)).

If this were a jury trial, and defense counsel had failed to request a jury instruction on self-defense, that could likely be ineffective assistance of counsel in this case, since we could not presume the jury knows the law of self-defense. *See*, *e.g.*, *State v. Davis*, 177 N.C. App. 98, 101, 627 S.E.2d 474, 477 (2006) ("It is prejudicial error to fail to include a possible verdict of not guilty by reason of self-defense in the final mandate to the jury. This error warrants a new trial." (Citations, quotation marks, brackets, and ellipses omitted)). Similarly, if this were a jury trial, and the State objected to evidence of self-defense and the trial court sustained this objection because defense counsel failed to give proper notice of this defense under N.C. Gen. Stat. § 15A-905(c), that might be ineffective assistance of counsel. But from the evidence and arguments at this trial, defendant's claim of self-defense was obvious, and defendant has not shown any indication the trial judge failed to consider that defense. After trial, the trial judge concluded -- without further comment -- that defendant was "guilty beyond a reasonable doubt." The trial judge made no statement regarding her reasoning or whether or not she considered the defense of self-defense. We do not make assumptions of error where none is shown. *See*, *e.g.*, *Lovett v. Stone*, 239 N.C. 206, 212,

79 S.E.2d 479, 483 (1954) ("Under the law of evidence, it is presumed unless the contrary appears that judicial acts and duties have been duly and regularly performed."). Defendant has offered no evidence that the trial court did not consider self-defense during its evaluation, so he has not shown a "reasonable probability" that the "result of the proceeding would have been different" if his counsel had given notice prior to trial of his intent to present a defense of self-defense. *Allen*, 360 N.C. at 316, 626 S.E.2d at 286 (citations and quotation marks omitted). We therefore conclude that defendant has not shown that his counsel's performance was deficient.

As this is the type of case where we can address an ineffective assistance of counsel claim on direct appeal -- because the cold record demonstrates that the trial court heard evidence supporting a defense of self-defense -- we hold that defendant received effective assistance of counsel.

Conclusion

We find no error with the trial court's judgment.

NO ERROR.

Judges ELMORE and TYSON concur.

STATE OF NORTH CAROLINA, Plaintiff
v.
NOE ONASIS ORELLANA, Defendant

No. COA17-1133

Filed 19 June 2018

1. Evidence—mother of child sexual assault victim—vouching for child's credibility—no plain error

There was no plain error in a prosecution for indecent liberties where the victim's mother testified that she believed her daughter was truthful in her accusations. Assuming that the testimony was improper, defendant did not demonstrate that the jury would probably have reached a different result absent the error.

2. Evidence—instantaneous conclusion of fact—detective's interview with minor

There was no error in an indecent liberties prosecution where a detective testified about his observations of the victim's demeanor when he was interviewing her. Rather than constituting an opinion about the victim's credibility, the detective's testimony contained the type of instantaneous conclusion admissible as a shorthand statement of fact.

3. Evidence—indecent liberties—expert witness—opinion testimony

A certified Sexual Assault Nurse Examiner did not vouch for the the victim's credibility in an indecent liberties prosecution where she testified that a finding of erythema, or redness, was consistent with touching, but could also be consistent with "a multitude of things."

4. Jury—questions—answers not given in courtroom

While the trial court erred in an indecent liberties prosecution by not conducting the jury into the courtroom to answer questions, there was no showing that defendant was prejudiced or that there was a constitutional violation. The bailiff brought notes containing questions into the courtroom to the judge and delivered the judge's written responses to the jury; the judge did not interact with or provide instructions to less than a full jury panel. The trial court could not allow the jury to review police reports that were not in evidence and there was no showing of prejudice from a failure to delay deliberations while a trial transcript was produced.

Appeal by defendant from judgment entered 16 June 2017 by Judge John O. Craig, III in Guilford County Superior Court. Heard in the Court of Appeals 18 April 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Narcisa Woods, for the State.

Meghan Adelle Jones for defendant-appellant.

ZACHARY, Judge.

Defendant appeals from the judgment entered upon his conviction of taking indecent liberties with the minor victim, V.R.[1] On appeal,

1. To protect her privacy, in this opinion we refer to the alleged victim by her initials.

defendant argues that the trial court erred by allowing witnesses to vouch for V.R.'s credibility and by failing to receive and address jury questions in the courtroom before the entire jury panel. We find no error.

Background

On 8 September 2014, the Guilford County Grand Jury indicted defendant for one count of taking indecent liberties with a minor. This matter came on for trial at the 13 July 2017 criminal session of Guilford County Superior Court, the Honorable John O. Craig, III presiding. At trial, the State presented evidence tending to establish the following facts:

On 21 March 2014, V.R., her mother Ms. Isaacs, and V.R.'s younger sibling drove from their home in Beaufort, North Carolina to Greensboro, North Carolina to the home of defendant and V.R.'s maternal grandmother, Mrs. R. They arrived at the home of Mrs. R. and defendant around 3:00 a.m. Upon their arrival, Mrs. R. was still awake and defendant was in their bedroom. V.R. asked Mrs. R. if she could sleep with her, and Mrs. R. agreed. When V.R. went to the bedroom to greet defendant, he asked her for a hug. V.R., who was fully dressed, climbed in the bed and hugged defendant. During the hug, V.R. testified that defendant started "patting [her] bottom, calling [her] his little princess," and then defendant touched the "inside of [her] privates" with his fingers. As defendant was touching V.R.'s privates, he asked her if she "liked it" and she responded, "no, I don't" and "jumped out of bed."

V.R. went to the kitchen and told her grandmother what had happened. Mrs. R. confronted defendant immediately and he denied that he had touched V.R. in an inappropriate manner. Defendant then went to bed, and Mrs. R. slept between V.R. and defendant.

The next morning, Mrs. R. informed Ms. Isaacs that "V.R. . . . told [her] that [defendant] rubbed her bottom." Ms. Isaacs testified that she did not think Mrs. R. was telling her the entire story, so she asked V.R. about it when V.R. woke up. V.R. told her, "defendant touched me on my bottom and on my front . . . he went under my underwear. He touched me on my bottom and then went around to the front and touched me there." Ms. Isaacs took V.R. to the magistrate's office, and V.R. was then transported by ambulance to the hospital. At the hospital, V.R. was interviewed separately by Greensboro Police Officer NB Fisher and Greensboro Police Detective Fred Carter. Detective Carter testified that V.R. told him that defendant put "his hand under her panties and touch[ed] her buttock and her vagina, which she described as her privates, front and back."

Later that day, V.R. was examined and interviewed by Lechia Davis, a certified Sexual Assault Nurse Examiner (SANE). SANEs are registered nurses who specialize in forensic collection of evidence and the medical care of victims of sexual assault. Nurse Davis used a magnifying device called a colposcope to conduct an examination of V.R.'s external genitalia, and she noted erythema, or redness, in the inner aspect of V.R.'s labia. Nurse Davis testified as an expert witness that erythema could have been caused by touching, improper hygiene, infection, or "a multitude of things." She also opined, over defendant's objection, that erythema was consistent with touching, but that it could also be consistent with "other things, as well."

During jury deliberations, the jury submitted requests to the presiding judge. The bailiff brought notes from the jury into the courtroom to Judge Craig. The first note requested the police reports, and Judge Craig wrote, signed, and had the bailiff deliver a note to the jury which stated: "The police reports were not introduced into evidence[,] so we are unable to give them to you. Only marked and admitted exhibits are available for your review." Another note requested a transcript of the witnesses' testimonies. Judge Craig again wrote, signed, and had the bailiff deliver a note to the jury which stated: "Trial transcripts are not [produced] contemporaneous[ly] with the testimony and the Court reporter would have to work many hours to get them into readable form. Therefore, I regrettably deny your request, in my discretion, because it would cause a significant delay in your deliberations."

Discussion

On appeal, defendant contends that the trial court erred by allowing witnesses to vouch for V.R.'s credibility and by failing to receive and address jury questions in the courtroom before the jurors as a whole.

I. Witness Testimony

In the present case, defendant contends that the trial court erred in allowing three witnesses to improperly vouch for V.R.'s credibility: Ms. Isaacs, Detective Carter, and Nurse Davis. Defendant concedes that he did not object at trial to the testimony of Detective Carter or Ms. Isaacs. Accordingly, we review the admission of both Detective Carter's and Ms. Isaacs's testimony for plain error. *See*, *e.g.*, N.C.R. App. P. 10(a)(4) (2017). In order to establish plain error, "a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the

entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378) (other citation omitted).

Defendant objected at trial to the testimony of Nurse Davis. Accordingly, we review the trial court's admission of Nurse Davis's testimony for abuse of discretion. *See State v. Livengood*, 206 N.C. App. 746, 747, 698 S.E.2d 496, 498 (2010).

A. Ms. Isaacs's Testimony

[1] Defendant first contends that the trial court erred by allowing Ms. Isaacs to vouch for V.R.'s credibility, and that this constituted plain error. We disagree.

Under N.C. Gen. Stat. § 8C-1, Rule 701, lay witness "testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2017). In the portion of Ms. Isaacs's testimony to which defendant assigns error, Ms. Isaacs states as follows:

> I knew that my daughter would tell me the truth because that's what I had instilled in her. So I was debating on whether to wake her up. I didn't want to traumatize her. I didn't want to scare her. I knew that when she would come to me at that moment when I asked her that she would tell me the truth.

In sum, Ms. Isaacs testified that she believed that her daughter was truthful in her accusations.

This Court confronted a similar issue in *State v. Dew*, 225 N.C. App. 750, 738 S.E.2d 215 (2013), *disc. review denied*, 366 N.C. 595, 743 S.E.2d 187 (2013). In *Dew*, the defendant appealed his conviction for taking indecent liberties with a minor and argued that the trial court had committed plain error in admitting the following testimony from the two victims' mother:

> They said just—they—I don't remember even which one of it was, but they said they had been messed with. And I said, what? They said, "We've been molested." And I said, "By who?" And they said, "Uncle John." And I just jumped up and down and screamed because I couldn't, you know, it was hard to believe. And I said, "No he didn't, no he

> didn't." And I mean, not telling them that he really didn't, but just—I couldn't believe that he'd done it. But I believe my girls and I looked at them and I—and I just remember hugging them and I said, oh God. You know what this means? And I said, you know, I'll do whatever I have to do to prosecute and they understood that.

Id. at 755, 738 S.E.2d at 219. We concluded as follows:

> When taken in context, Ms. M.'s statement that she believed her daughters was made in the course of a discussion of her emotional state at the time that Violet and Becky informed her that Defendant had sexually abused them. Assuming, without in any way deciding, that the admission of this portion of Ms. M.'s testimony was improper, Defendant has failed to show that, absent the error, the jury would have probably reached a different result. Simply put, in view of the relatively incidental nature of the challenged statement and the fact that most jurors are likely to assume that a mother will believe accusations of sexual abuse made by her own children, we cannot conclude that the challenged portion of Ms. M.'s testimony had any significant impact on the jury's decision to convict Defendant.

Id. at 755-56, 738 S.E.2d at 219 (citing *State v. Ramey*, 318 N.C. 457, 466, 349 S.E.2d 566, 572 (1986) (stating that "[i]t is unlikely that the jury gave great weight to the fact that a mother believed that her son was truthful")).

Assuming, *arguendo*, that the admission of this portion of Ms. Isaacs's testimony was improper in the present case, defendant has failed to demonstrate that the jury would have probably reached a different result absent the error, for the same reasons that this Court stated in *Dew*. *See Dew*, 225 N.C. App. at 756, 738 S.E.2d at 219. It is not likely that the jury's decision to convict defendant was significantly impacted by a mother's statement that her daughter "would tell [her] the truth" about an incident of sexual abuse. We find no plain error.

B. Detective Carter's Testimony

[2] Defendant next argues that Detective Carter's testimony at trial improperly vouched for V.R.'s credibility and was plain error. We disagree.

Again, lay witness "testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701. However, as our Supreme Court has stated:

> The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, *matters of fact*, and are admissible in evidence.

State v. Lloyd, 354 N.C. 76, 109, 552 S.E.2d 596, 620 (2001) (citation omitted) (emphasis added).

Here, Detective Carter testified about his observation of V.R.'s demeanor during Detective Carter's interview with V.R., as follows:

> Q. And did you make any observations of [V.R.]'s demeanor during the time that you interacted with her?
>
> A. Her responses seemed to be thoughtful. She paused several times while telling the story, just trying to recollect, and with each account she looked at the ground or looked downward several times, seemed to be genuinely affected by what had occurred.

Defendant maintains that this testimony was the functional equivalent of vouching for V.R.'s credibility. We disagree.

This testimony concerning V.R.'s demeanor does not constitute an opinion as to the credibility of V.R. that is subject to Rule 701. *See State v. Gobal*, 186 N.C. App. 308, 318, 651 S.E.2d 279, 286 (2007). Rather, Detective Carter's testimony contains precisely the type of "instantaneous conclusions" our Supreme Court considers to be admissible "shorthand statements of fact." *Id.*; *State v. Braxton*, 352 N.C. 158, 187, 531 S.E.2d 428, 445 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). Accordingly, there was no error in the admission of this testimony.

C. Nurse Davis's Testimony

[3] Defendant also argues that the trial court abused its discretion in admitting certain opinion testimony from Nurse Davis as in effect vouching for V.R.'s credibility, over defendant's objection at trial. We find defendant's argument to be without merit.

Under North Carolina law, it is well established that "the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988) (citations omitted). "In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (per curiam) (citation omitted) (emphasis in original). "However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *Id.* (citations omitted).

In the present case, Nurse Davis gave the following testimony to which defendant assigns error:

> Q. . . . With regard to a finding, such as the erythema or redness, could that sort of redness be caused by touching of some sort?
>
> A. Yes, it could.
>
> Q. Could it also be caused by other things?
>
> A. Yes.
>
> Q. And what other types of things might cause that?
>
> A. If a little girl doesn't clean herself well. If there were more aggressive touching, it would probably be redder. There could be abrasions there and they weren't noted. So as far as what else, if there were infection, I mean, it could be, you know, a multitude of things.
>
> . . .
>
> Q. Yes. Do you have an opinion to a reasonable degree of medical certainty as to whether your physical examination of [V.R.] was consistent with the medical history that you received of touching?
>
> A. Yes. It was consistent.
>
> Q. And it's fair to say, again, that it could also be consistent with other things, as well?
>
> A. Yes.

Nurse Davis stated that the erythema was consistent with touching, but also could be consistent with "a multitude of things." We fail to see how this testimony improperly vouches for V.R.'s credibility and we find defendant's arguments unconvincing. This testimony, that erythema is "consistent" with touching, is not tantamount to vouching for V.R.'s credibility. Accordingly, the admission of this testimony was not an abuse of discretion by the trial court, nor did it constitute prejudicial error.

II. Jury Questions

[4] Next, defendant contends that the trial court committed reversible error by failing to receive and address jury questions before the entire jury panel in the courtroom, in violation of both N.C. Gen. Stat. § 15A-1233(a) and Article I, Section 24 of the North Carolina Constitution. After careful review, we conclude that while the trial court erred by failing to conduct the jury to the courtroom as required by N.C. Gen. Stat. § 15A-1233(a), there was no showing that this error was prejudicial or that there was a constitutional violation.

N.C. Gen. Stat. § 15A-1233(a) provides, in relevant part:

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

N.C. Gen. Stat. § 15A-1233(a) (2017). Article I, Section 24 of the North Carolina Constitution states that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. Art I, § 24. This provision of our Constitution has been interpreted as prohibiting "the trial court [from] provid[ing] explanatory instructions to less than the entire jury [as a] violat[ion] [of] the defendant's constitutional right to a unanimous jury verdict." *State v. Wilson*, 363 N.C. 478, 483, 681 S.E.2d 325, 329 (2009).

In advancing his argument, defendant relies on our Supreme Court's decisions in *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985), and *State v. Wilson*, 363 N.C. 478, 681 S.E.2d 325 (2009). In *Ashe*, the jury foreman returned to the courtroom alone after the jury had retired to deliberate, where he had the following exchange with the presiding judge:

> The Court: Mr. Foreman, the bailiff indicates that you request access to the transcript?
>
> Foreman: We want to review portions of the testimony.
>
> The Court: I'll have to give you this instruction. There is no transcript at this point. You and the other jurors will have to take your recollection of the evidence as you recall it and as you can agree on that recollection in your deliberations.

Ashe, 314 N.C. at 33, 331 S.E.2d at 655-56. Our Supreme Court held that the trial court violated Article I, Section 24 and N.C. Gen. Stat. § 15A-1233(a) by failing to summon all of the jurors to the courtroom before hearing and responding to the jury's request to review the trial transcript. *Id.* at 40, 331 S.E.2d at 659.

In *Wilson*, after being notified by the jury of concerns regarding the foreperson, "the trial court summoned only the foreperson and provided him with instructions on and off the record that it did not provide to the rest of the jury." *Wilson*, 363 N.C. at 487, 681 S.E.2d at 332. Furthermore,

> following the third unrecorded bench conference with the foreperson, the trial court informed the foreperson that it needed to give him 'one other instruction' and instructed him that '[t]he issues about which we had talked in this courtroom, *both here at the bench and also openly on the record*, are issues [that you] are not to share with the other jurors.'

Id. Applying the principles from *Ashe*, the Court concluded that "the trial court provided the foreperson with instructions that it did not provide to the rest of the jury in violation of defendant's right to a unanimous jury verdict." *Id.* at 486, 681 S.E.2d at 331. The Court further held "that where the trial court instructed a single juror in violation of defendant's right to a unanimous jury verdict under Article I, Section 24, the error is deemed preserved for appeal notwithstanding defendant's failure to object." *Id.*

The facts of the instant case are, however, more closely analogous to those presented in *State v. McLaughlin*, 320 N.C. 564, 359 S.E.2d 768 (1987). In *McLaughlin*, after retiring for deliberation, the jury sent the trial judge a note requesting that the trial testimony of two witnesses be reread. *McLaughlin*, 320 N.C. at 567, 359 S.E.2d at 770. "The trial judge sent a message to the jury, through the bailiff, denying the jury's request. The record [did] not indicate whether the judge's message was in written form or transmitted orally by the bailiff." *Id.* at 567-68, 359

S.E.2d at 771. Our Supreme Court held that, while the trial court erred "by not adhering to the requirements of [N.C. Gen. Stat. § 15A-1233(a)]," it was not a prejudicial error or a violation of Article I, Section 24. *Id.* at 568, 359 S.E.2d at 771. Moreover, the Court clarified that the reference to Article I, Section 24 in *Ashe* "was intended to convey no more than the seemingly obvious proposition that for a trial judge to give explanatory instructions to fewer than all jurors violated only the unanimity requirement imposed on jury verdicts by Article I, [S]ection 24." *McClaughlin*, 320 N.C. at 569, 359 S.E.2d at 772.

In the present case, the jury sent two notes to the trial court, one requesting the police reports, and another requesting transcripts of trial testimony. On both occasions, the bailiff brought these notes into the courtroom to the judge and delivered the judge's written responses to the jury. While this is error because the trial court failed to comply with the provisions of N.C. Gen. Stat. § 15A-1233(a), there was no violation of defendant's right to a unanimous verdict under Article I, Section 24. The trial court did not interact with or provide instructions to less than a full jury panel.

Additionally, a new trial is not warranted as there is no showing that the error prejudiced defendant. "A new trial may be granted only if the trial court's error was such that 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached.' " *Id.* at 570, 359 S.E.2d at 772 (quoting N.C. Gen. Stat. § 15A-1443(a) and citing *State v. Loren*, 302 N.C. 607, 276 S.E.2d 365 (1981)). Here, the trial court could not allow the jury to review police reports that were not in evidence, and there was no showing of prejudice to defendant in the trial court's decision not to delay deliberations in order to have a transcript produced of the testimony of the State's witnesses. We find no prejudicial error.

Conclusion

For the reasons stated herein, we conclude that defendant received a fair trial, free from plain or prejudicial error.

NO ERROR.

Judges ELMORE and TYSON concur.

RUSSELL WALKER, PLAINTIFF
v.
HOKE COUNTY ET AL., DEFENDANTS

No. COA17-341

Filed 19 June 2018

1. Jurisdiction—standing—citizen—county transfer of land

Plaintiff did not have standing for his claims arising from Hoke County's conveyance of land for an ethanol plant where he did not allege that he was a taxpayer and did not assert a traceable, concrete, and particularized injury resulting from the transfer of the land.

2. Public Officers and Employees—amotion—lack of standing

The trial court did not err by dismissing plaintiff's claim to remove elected county officials for lack of standing. Removal by "amotion" is a quasi-judicial procedure employed by the board or commission from which the member is being removed for cause. Plaintiff did not allege that he was a member of any of the boards from which he sought to remove members.

Appeal by plaintiff from order entered 16 February 2017 by Judge James F. Ammons, Jr. in Hoke County Superior Court. Heard in the Court of Appeals 18 September 2017.

Russell F. Walker, pro se, plaintiff-appellant.

Locklear, Jacobs, Hunt & Brooks, by Grady L. Hunt, for defendant-appellee Hoke County.

Moser and Bruner, P.A., by Jerry L. Bruner, for defendant-appellee Fifth Third Bank, Inc.

Horack Talley Pharr & Lowndes, P.A., by Robert B. McNeill and Christopher T. Hood, for defendant-appellee Tyton NC Biofuels LLC.

BERGER, Judge.

Russell F. Walker ("Plaintiff") appeals an order granting Hoke County, Fifth Third Bank, Inc., and Tyton NC Biofuels, LLC's (collectively "Defendants") motion to dismiss Plaintiff's complaint for lack of

standing and failure to state a claim under Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure. Plaintiff argues the trial court erred because he sufficiently established standing as a taxpayer of Hoke County, and has suffered an injury from which a favorable judgment on his claims can grant him relief. We disagree.

Factual and Procedural Background

On March 26, 2008, Hoke County conveyed a 500 acre tract of land by Special Warranty Deed ("the Deed") to Clean Burn Fuels, LLC ("Clean Burn"). Clean Burn built an ethanol plant on the land, but after financial problems the lender foreclosed on the property in 2011. In 2014, Tyton NC Biofuels, LLC purchased the property and obtained a loan from Fifth Third Bank, Inc. The loan was secured by a deed of trust on the 500 acre tract of land.[1]

On December 20, 2016, Plaintiff filed a complaint in Hoke County Superior Court seeking to set aside the original deed from Hoke County to Clean Burn, revoke the deed of trust, and remove from office elected officials who approved the transfer. In January 2017, Defendants filed answers to Plaintiff's complaint and motions to dismiss for lack of standing and failure to state a claim for which relief can be granted. On January 19, 2017, Plaintiff filed a motion for summary judgment alleging no genuine issue of material fact. A hearing was held on Defendants' motions to dismiss and Plaintiff's motion for summary judgment. The trial court denied Plaintiff's motion for summary judgment and granted Defendants' motions to dismiss with prejudice. Plaintiff appeals.

Analysis

[1] "In our de novo review of a motion to dismiss for lack of standing, we view the allegations as true and the supporting record in the light most favorable to the non-moving party." *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008).

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878, *disc. rev. denied*, 356 N.C. 610, 574 S.E.2d 474 (2002) (citation omitted). "[O]nly one with a genuine grievance" can bring a valid complaint. *Mangum*, 362 N.C. at 642, 669 S.E.2d at 282 (citations omitted). To establish standing, three elements must be satisfied:

1. Specific prices, dates, and transactions are not included in the record on appeal.

> (1) injury in fact – an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002) (citation and internal quotation marks omitted), *disc. rev. denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). "Standing most often turns on whether the party has alleged 'injury in fact' in light of the applicable statutes or caselaw." *Id.* Further, "a plaintiff must demonstrate standing separately for each form of relief sought." *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 185, 145 L. Ed. 2d 610, 629 (2000).

Historically, "taxpayers have standing to challenge the allegedly illegal or unconstitutional disbursement of tax funds by local officials." *Goldston v. State*, 361 N.C. 26, 31, 637 S.E.2d 876, 879-80 (2006). However, to establish an injury as a taxpayer, the individual must allege "a misuse of public funds in violation of state statute," instead of merely "challenging the wisdom of the County's decision." *Reese v. Mecklenburg Cnty., N.C.*, 204 N.C. App. 410, 426, 694 S.E.2d 453, 464, *disc. rev. denied*, 364 N.C. 326, 700 S.E.2d 924 (2010).

In prior cases before our Supreme Court, taxpayers have been granted standing to bring an action against local and state government bodies when they have alleged an injury that is concrete, traceable, and particular to a specific action in violation of an applicable statute. *See Goldston*, 361 N.C. at 30-33, 637 S.E.2d at 879-81; *McIntyre v. Clarkson*, 254 N.C. 510, 513-14, 119 S.E.2d 888, 890-91 (1961) (holding a taxpayer had standing to facially challenge the constitutionality of a statute). *Goldston v. State* noted "the right of a citizen and taxpayer to maintain an action in the courts to restrain the unlawful use of public funds *to his injury* cannot be denied." *Goldston*, 361 N.C. at 33, 637 S.E.2d at 881 (citation and quotation marks omitted) (emphasis added).

In the case *sub judice*, Plaintiff has failed to establish standing for each of his claims for relief. In his complaint, Plaintiff failed to allege that he is a taxpayer. Moreover, even if we were to assume Plaintiff is a Hoke County taxpayer, he has not asserted a traceable, concrete, and particularized injury resulting from the transfer of the 500 acre tract of land between the parties named in his complaint. Even in the light most favorable to the non-moving party, we find no injury in fact under

"any set of facts to support his claim which would entitle him to relief." *Block v. County of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000).

[2] In addition, Plaintiff seeks removal of various elected officials stemming from transfer of the property. However, standing pursuant to N.C. Gen. Stat. § 153A-77 and the common law removal procedure known as "amotion" does not derive from taxpayer status, but instead from the county board of commissioners. Section 153A-77 provides in pertinent part:

> A member may be removed from office by the county board of commissioners for (i) commission of a felony or other crime involving moral turpitude; (ii) violation of a State law governing conflict of interest; (iii) violation of a written policy adopted by the county board of commissioners; (iv) habitual failure to attend meetings; (v) conduct that tends to bring the office into disrepute; or (vi) failure to maintain qualifications for appointment required under this subsection. A board member may be removed only after the member has been given written notice of the basis for removal and has had the opportunity to respond.

N.C. Gen. Stat. § 153A-77(c) (2017).

Removal by amotion is a "quasi-judicial" procedure employed by the board or commission from which the member is being removed for cause. *Russ v. Board of Education*, 232 N.C. 128, 129-30, 59 S.E.2d 589, 591 (1950); *see also Burke v. Jenkins*, 148 N.C. 25, 61 S.E. 608 (1908).[2] An amotion proceeding "could not be taken without notice and an opportunity to be heard, except where the officer is removable without cause at the will of the appointing power." *Stephens v. Dowell*, 208 N.C. 555, 561, 181 S.E. 629, 632 (1935) (citations omitted). Plaintiff has not alleged in his complaint or on appeal that he is a member of any elected or appointed office. Because Plaintiff is not a member of any of the boards from which he seeks to remove members, we affirm the trial court's order dismissing Plaintiff's claims for lack of standing.

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2. The most recent amotion proceeding in North Carolina was in 2013 in *Berger v. New Hanover County Bd. of Comm'rs.*, 2013 NCBC 45, 2013 WL 4792508 (2013) (unpublished), where the New Hanover County Superior Court upheld the removal of a local County Commissioner and recognized the validity of the amotion procedure when "accompanied by appropriate procedural safeguards and the Board's findings and conclusions were supported by sufficient competent evidence." *Id.* at *11.

Accordingly, we find the trial court did not err by dismissing Plaintiff's complaint for lack of standing pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. Because we find that Plaintiff does not have standing to pursue the claims in his complaint, we need not reach any further issues argued by Plaintiff on appeal.

Conclusion

The trial court did not err in granting Defendants' motion to dismiss Plaintiff's complaint for lack of standing under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. Accordingly, we affirm the trial court's order.

AFFIRMED.

Chief Judge McGEE and Judge DIETZ concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 JUNE 2018)

AMELIO v. REAL ESTATE BY DESIGN, LLC No. 17-724	Durham (15CVS5263)	Dismissed
BATES v. GOMEZJURADO No. 16-242-2	Union (15CVD1688)	Vacated and Remanded
CABARRUS CTY. DEP'T OF HUM. SERVS. v. MORGAN No. 17-487	Cabarrus (13CVD2783)	Reversed and Remanded
CARROLL v. MANVILLE No. 17-1172	N.C. Industrial Commission (13-706566)	Affirmed
DANIELS v. DANIELS No. 18-73	Cumberland (17CVD2693)	Dismissed
GIUSTO v. ROBERTSON VENTURES, INC. No. 17-1205	Wake (16CVS3081)	Dismissed
HOMESTEAD AT MILLS RIVER PROP. OWNERS ASS'N, INC. v. HYDER No. 17-606	Henderson (11CVS784)	Dismissed
IN RE A.B. No. 17-1321	Cabarrus (13JT121-124)	Affirmed
IN RE A.J. No. 17-1334	Durham (14JA61) (15JA163)	Affirmed
IN RE J.R. No. 18-103	Wake (15JT163)	Affirmed
IN RE K.K.-K.C. No. 18-18	Guilford (15JT292) (15JT294)	Affirmed
IN RE N.L.M. No. 17-1346	Guilford (15JT52-53)	Affirmed
IN RE P.B. No. 18-83	Harnett (16JT58)	Affirmed

IN RE S.S. No. 17-1383	Tyrrell (16JA5) (16JA6)	AFFIRMED IN PART. VACATED AND REMANDED IN PART.
IN RE T.S.P. No. 18-118	Granville (16SPC156)	Vacated and Remanded.
STATE v. BIAS No. 17-1236	Wake (16CRS217819-22)	No Error
STATE v. BROWN No. 17-1271	Cherokee (15CRS50801) (15CRS50817-21) (15CRS50823-24) (16CRS226) (17CRS1000) (17CRS445)	Affirmed in part; Remanded for resentencing in part.
STATE v. BURNETTE No. 17-847	Lincoln (15CRS51438) (16CRS166)	No Error
STATE v. COLE No. 17-1196	Moore (17CRS635)	Reversed
STATE v. DAIL No. 17-294	Lenoir (11CRS51547)	No Error
STATE v. GREENE No. 17-916	Wilson (16CRS51279)	Vacated and remanded in part, remanded for correction of a clerical error in part.
STATE v. HEWITT No. 17-1157	Catawba (11CRS3822-23) (11CRS4077) (11CRS51398) (11CRS51400-401)	No Error
STATE v. MILLIGAN No. 18-307	Burke (15CRS51782) (17CRS49)	Affirmed
STATE v. MILLS No. 17-1350	Mecklenburg (15CRS237939) (15CRS237941-42)	Affirmed
STATE v. PRATT No. 17-1294	Johnston (16CRS1735) (16CRS52616)	No Error

STATE v. PRUITT No. 17-883	Mecklenburg (14CRS204260)	No error in part; vacated and remanded in part
STATE v. RABORN No. 17-1105	Cleveland (15CRS50051)	No Error
STATE v. RAMIREZ No. 17-1273	Harnett (15CRS50328)	Affirmed
STATE v. WILLIAMS No. 17-518	Wake (14CRS205973)	No plain error
WOLFE v. POINDEXTER No. 17-1366	Lincoln (16CVD1442)	Reversed

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